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1939.

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CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

THOMPSON OTHERWISE HULTON *v.* THOMPSON.

C. A.
1938
Oct. 13.

Divorce—Costs—Wife's petition—Husband's alleged adultery—Decree nisi—King's Proctor's intervention—Named woman's certificates of virginity—Fresh evidence—Decree nisi upheld—Costs of intervention—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 181, *sub-s.* 1; *s.* 182; *s.* 183, *sub-s.* 2.

On a wife's petition for divorce on the ground of her husband's adultery with a named person, the husband at first defended and the named person intervened; but, before the hearing of the petition, the defence and intervention were withdrawn. A decree nisi was granted, but the judge sent the papers to the King's Proctor because he had been informed by counsel for the petitioner that her solicitors had been sent the certificates of two gynæcologists that the intervener was virgo intacta. After making inquiries, the King's Proctor filed a plea showing cause why a decree absolute should not be granted, but the decree nisi be rescinded.

Langton J. held on the evidence that the intervener was a virgo intacta, but held, after hearing additional evidence in support of the petition, that it was established that there had been mutual intercourse between the husband and the intervener sufficient in law to constitute adultery. He therefore dismissed the plea and ordered the King's Proctor to pay three-quarters of the petitioner's costs on the hearing of the plea.

C. A.
1938

THOMPSON OTHERWISE HULTON
v.
THOMPSON.

On appeal by the King's Proctor on the question of costs:—

Held, that in instructing the King's Proctor to file the plea, the Attorney-General was exercising his discretion, and the plea was not filed as the result of any order of the Court. The King's Proctor's action was taken under s. 183, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, and the matter of costs was therefore within the discretion of the judge—a discretion which he had exercised on a proper principle.

Decision of Langton J. [1938] P. 162 as to costs affirmed.

APPEAL of the King's Proctor from the order of Langton J. (1) that he should pay part of the petitioner's costs of his intervention.

In her petition, presented in October, 1936, Mrs. Florence Elizabeth Millicent Thompson, formerly Lady Hulton, of Upper Brook Street, W., alleged that her husband, Major John Henry Thompson, a retired Army officer, had committed adultery with Miss Margaret Causton in the autumn of 1936 at Old Well Cottage, Peppard, near Henley, and later at the latter's flat at Cumberland Mansions, Marylebone. The petitioner prayed for the dissolution of her marriage. By their answers the respondent and Miss Causton, who intervened, denied the charges, but the suit was in fact undefended.

Langton J. granted the petitioner a decree nisi on July 9, 1937, and he sent the papers to the King's Proctor for inquiry in view of a statement made by counsel for the petitioner that Miss Causton had obtained and her solicitors had sent to the petitioner's solicitors two medical certificates that she was virgo intacta.

On January 14, 1938, the King's Proctor filed a plea alleging that the respondent and Miss Causton had not committed adultery and that at all material times she was virgo intacta, and he claimed that the decree nisi should be rescinded and the petition dismissed. The petitioner joined issue. Evidence was given in support of the plea and fresh evidence was admitted in support of the charges in the petition.

Langton J. said that two substantial issues had arisen: (1.) whether Miss Margaret Causton was or was not virgo intacta; (2.) whether adultery had been committed by

(1) [1938] P. 162.

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Major Thompson and Miss Causton. On the first issue he had come to the conclusion that Miss Causton was the lady examined by the two doctors. The result was that, although this evidence of the doctors was not conclusive upon the question of adultery, it made the burden upon the petitioner much heavier. After examining the evidence he was regretfully forced to the conclusion that the respondent and Miss Causton had had mutual intercourse amounting to adultery in law.

A discussion ensued as to costs, and on April 5, 1938, Langton J. gave judgment, saying that without in any way suggesting that the King's Proctor had done anything except his duty—and he had done it at his (the judge's) instigation and suggestion—he thought that the justice of the case would be met if the King's Proctor paid three-quarters of the petitioner's taxed costs of the intervention.

Having obtained leave to appeal on the question of costs, the King's Proctor appealed on this question only. The appeal was heard on October 13, 1938.

Sir Terence O'Connor S.-G. and *H. W. Barnard* for the appellant. In this case the King's Proctor intervened after a decree nisi had been granted at the request of Langton J. and on the ground that material facts were not put in evidence. The King's Proctor established what he set out to show, and it was only on account of new evidence admitted in support of the petitioner that the decree nisi stood. The intervention was therefore fully justified. It is in these circumstances that it has been felt to be a matter of public interest that the public should not be called on to bear any part of the petitioner's costs.

Under the Matrimonial Causes Act, 1857, there was only one decree for dissolution of marriage, and as it sometimes happened that the Court found itself embarrassed by this, the plan was in those cases adopted of suspending the decree. It was in 1860 that the decree was split up, and s. 7 of the Matrimonial Causes Act, 1860, contained the first compendious indication of the duties of the King's Proctor. There was then no power to order the King's Proctor to bear costs, but alterations were made by the Matrimonial Causes Act, 1878, and his position is dealt with for present purposes in the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 181, 182, 183. Sect. 181, sub-s. 1, provides that in the case of any petition for divorce or for nullity of marriage "The court may, if it thinks fit, direct all necessary papers "in the matter to be sent to His Majesty's Proctor, "who shall under the directions of the Attorney-General "instruct counsel to argue before the court any question "in relation to the matter which the court deems to be "necessary or expedient to have fully argued. . . . ." That is the sub-section that was applied in the present case. Then s. 182, sub-s. 1, gives the Court a complete discretion as to costs when the King's Proctor "intervenes or shows cause "against a decree nisi" and s. 183, sub-s. 2, provides that "After the pronouncing of the decree nisi and before the "decree is made absolute, any person may . . . . show cause why "the decree should not be made absolute . . . . by reason of "material facts not having been brought before the court. . . . ."

[CLAUSON L.J. Did not the King's Proctor intervene under s. 183, sub-s. 2? Sect. 181, sub-s. 1, is surely only directed to having a point argued on the hearing of the petition for a decree nisi.]

The King's Proctor came to the Court on the requirement of the learned judge under s. 181, sub-s. 1. That is how the King's Proctor was set in motion, and it is that fact that makes it improper to order him to pay costs.

[CLAUSON L.J. Under s. 181, sub-s. 1, the Court takes action in order to have a question of law properly argued; but in this particular case, as fresh evidence was put in by the King's Proctor, it could only have been under s. 183, sub-s. 2.]

The fact is that a wider jurisdiction has been assumed, and it has become the common practice for the Court to direct the King's Proctor to make investigations and then to report to the Court and receive directions as to the course to be adopted. But that was not done here by the King's Proctor.

[SIR WILFRID GREENE M.R. It was for the King's Proctor to make up his mind whether he should intervene, and he only intervenes if he thinks the decree nisi has been wrongly granted.]

That is so except in cases covered by the decision in *Sloggett* v. *Sloggett.* (1) Here Langton J. had indicated that the fact of virginity, if proved, would be a material fact involving a totally different trial of the issues.

Originally, it was not the practice to order the King's Proctor to pay costs: *Higgins* v. *Higgins* (2); but in *Carter* v. *Carter* (3) a different view was taken. Both cases went to the Court of Appeal, and it was held that the Court had a discretion as to costs on the terms of the relevant statute: *Higgins* v. *King's Proctor. King's Proctor* v. *Carter.* (4)

Here the King's Proctor was set in motion by the Court under s. 181, sub-s. 1.

[CLAUSON L.J. The ambit of s. 181, sub-s. 1, is confined to having a question argued before the Court.]

Sloggett v. *Sloggett* (1) shows that a wider view has been taken of the sub-section, but it is true that the case related only to matters arising before the decree nisi was granted.

In any case Langton J. did not exercise his discretion correctly in ordering the King's Proctor to pay costs of the petitioner.

Doughty K.C. and *R. Bush James* for the petitioner were not called upon.

SIR WILFRID GREENE M.R. This is an appeal by the King's Proctor against an order whereby he was directed to pay three-quarters of the petitioner's taxed costs, the costs in question being the costs incurred on the occasion of the action of the King's Proctor in showing cause why the decree nisi should not be made absolute.

The decree nisi was pronounced on July 9, 1937, on the petition of the wife. On January 14, 1938, the King's Proctor filed a plea to show cause why that decree nisi should not be made absolute, and he asked for the rescission of the decree, dismissal of the petition and his costs. That plea failed and the learned judge made the order with regard to costs which I have already mentioned.

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(1) [1928] P. 148.
(2) [1910] P. 1.
(3) [1910] P. 4.
(4) [1910] P. 151.

If the matter had stood there, no possible reason could have existed for disputing the correctness of the judge's exercise of his discretion as to costs. But it is said on behalf of the King's Proctor that the circumstances of this case were such that the Court ought not to have ordered the King's Proctor to pay costs. It is said that the action of the King's Proctor in showing cause originated in a request made by the learned judge, and that that circumstance ought, as a matter of principle, to be sufficient to absolve the King's Proctor from the liability to pay costs, although it is not suggested that it would be sufficient ground why he should ask for his costs of his unsuccessful action.

The relevant facts bearing on that argument can be very shortly stated. The petition was originally defended and the woman named in the petition intervened. That defence and that intervention were withdrawn before the petition came on for hearing, but in the meanwhile the solicitors for the petitioner had had sent to them on behalf of the intervener two medical certificates certifying that the intervener was virgo intacta. This circumstance was with perfect propriety brought to the attention of the Court by counsel for the petitioner. The evidence which was led on behalf of the petitioner was very strong. The judge found it convincing, and he pronounced the decree nisi. At the same time, the existence of these certificates raised a doubt in the mind of everybody. The nature of that doubt at the time of the hearing appears to have been whether or not the intervener had engineered a fraud on the doctors by getting some other woman to impersonate her. That was the sort of suggestion which was made. The learned judge at the conclusion of the proceedings said this in relation to that suggested personation: "If there is a fraud here and a class of fraud has "been perpetrated it is a class of fraud which requires very "complete investigation." He then gave the decree, and said: "I think I will impound the papers and ask the King's

"Proctor to make some inquiries and see if he can get any "further."

The judge directed the papers to be sent to the King's Proctor, and the King's Proctor, having made certain investigations, apparently satisfied himself that the certificates in question did relate to the intervener, and that there had been no such personation as had been suggested. He thereupon, acting under the direction of the Attorney-General, filed his plea and in that plea he alleged that "The decree "nisi was obtained contrary to the justice of the case by "reason of the following material facts not having been "brought to the notice of this honourable Court: That the "respondent had not committed adultery with the intervener, "that the intervener is and was at all material times a virgin "and did not in fact commit the alleged adultery whereof "inferential evidence was given at the hearing."

It was not, and could not be, suggested that the Attorney-General, when instructing the King's Proctor to put in that plea, was doing anything else than exercising the discretion which is placed in his hands. That plea was not put in as the result of some order of the Court. The Court had no jurisdiction whatsoever to order the King's Proctor to put in a plea showing cause or to order the Attorney-General to instruct the King's Proctor to put in such a plea. The action of the Attorney-General and of the King's Proctor was an action taken on the discretion of the Attorney-General.

When the matter came to be heard, evidence was called on behalf of the King's Proctor and further evidence was called on behalf of the petitioner. There was some controversy whether the petitioner should be allowed to call such further evidence to prove adultery. That controversy was decided by the learned judge in favour of the petitioner, and after the whole of the evidence had been heard the learned judge, while thinking that there was no case of personation, nevertheless decided that the case was one where, in spite of the fact that the woman was a virgin, adultery in law had been proved. The result of that, of course, was that the decree nisi stood and the King's Proctor failed.

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It is said that, as the King's Proctor had been set in motion by the learned judge himself, he should be relieved of the liability to pay costs which otherwise would, prima facie, have rested on him. The action of the King's Proctor, as I have said, was in one sense set in motion by the action of the learned judge in sending the papers to him and by the request to investigate, but the phrase "set in motion" is one which is picturesque and metaphorical. What it does not mean in this case is that the King's Proctor was set in motion in the sense that the learned judge, acting within some jurisdiction, gave him an order to do what he did. That the learned judge did not do and could not have done. That the King's Proctor was set in motion in the sense that the facts were brought to his notice with a request to investigate, and that he did in consequence of that make an investigation, is perfectly true; but the decision to take the action to which he came after making that investigation was his own decision over which the Court had not exercised, and did not purport to exercise, any authority whatsoever.

That being so, it seems to me that there is an end of the case. It was suggested that the action of the Court and of the King's Proctor really fell under s. 181, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, which states: "The court may, if it thinks fit, direct all necessary papers "in the matter to be sent to his Majesty's Proctor, who shall "under the directions of the Attorney-General instruct counsel "to argue before the court any question in relation to the "matter which the court deems to be necessary or expedient "to have fully argued, and his Majesty's Proctor shall be "entitled to charge the costs of the proceedings as part of the "expenses of his office."

It seems to me quite impossible to hold that the learned judge, when he sent the papers to the King's Proctor with a request to investigate the facts, was acting under that sub-section. He was not indicating any question to be argued, he was not purporting to require the assistance of the King's Proctor in arguing some point which had occurred in the case. What he was doing was what is commonly done by learned judges when in a matter before them something occurs which ought to be brought to the notice of those concerned with the administration, for example, of the criminal law. Of their own initiative they may impound papers and see that the information reaches the appropriate quarter. That, it seems to me, is exactly what the learned judge was doing in this case, and I am quite unable to take the view that he was exercising or thought that he was exercising any jurisdiction under the sub-section which I have quoted.

I do not wish to throw the slightest doubt on any practice of the Court which may exist under that sub-section requesting the argument of some question by the King's Proctor, but in the present case the relevant section under which the action of the King's Proctor was taken is sub-s. 2 of s. 183, which enables any person—which includes the King's Proctor—after decree nisi and before decree absolute, to " show cause "why the decree should not be made absolute by reason of "the decree having been obtained by collusion"—that of course is not the case here—" or by reason of material facts "not having been brought before the court." That is the phrase under which the King's Proctor's action was taken—failure to bring material facts before the court. It was under that sub-section that the King's Proctor acted, and the learned judge, as I have said, had no jurisdiction, and certainly never intended to assert jurisdiction, to call on the King's Proctor to take the action which that sub-section permits.

The simple fact is that the King's Proctor, having had information brought to his attention by the learned judge, and having investigated the matter, under the instructions of the Attorney-General, decided to take the course which the statute entitled him to take. He thereby made himself a party to the proceedings. He was asking for specific relief on the basis of certain allegations of fact. He failed to obtain the relief which he prayed. Although he established one of his allegations of fact—namely, that the woman was a virgin—he failed to establish what was the principal allegation of fact for the purpose of the relief which he was asking—namely, that adultery had not been committed.

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That being so, it seems to me the case assumes a very simple character, and in my opinion there is no ground whatsoever why this Court should interfere with the discretion which the learned judge has exercised, which appears to me to have been exercised on a perfectly proper principle. The appeal must be dismissed, with costs.

Before concluding I will just say one word about *Sloggett* v. *Sloggett* (1), which was referred to. That was a decision of Lord Merrivale. All I need say about it is that the Court, before decree nisi, invited and in fact requested the assistance of the King's Proctor acting, as the learned President held, under jurisdiction conferred on it by what is now s. 178, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, which imposes on the Court the duty of satisfying itself as to the facts alleged, and so forth. In the course of discharging that duty the Court had desired to have the assistance of the King's Proctor and required his attendance. I wish to throw no doubt whatever on that practice. It is not a matter with which we are concerned, because that was a totally different case. There, before the decree nisi had been pronounced at all, the Court took that action. There is no such jurisdiction in the present case and no such jurisdiction did the learned judge purport to exercise.

SCOTT L.J. I agree.

CLAUSON L.J. I agree.

Appeal dismissed.

Solicitors: *The King's Proctor; Withers & Co.*

H. C. G.

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(1) [1928] P. 148.

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Divorce—Husband's petition on ground of desertion—Petitioner's adultery since wife's desertion and within three years immediately preceding the petition—Discretionary power of Court—Principles defined—Supreme Court of Judicature (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 176 (*b*), 178, *proviso* (*as amended by Matrimonial Causes Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *ss.* 2, 4), *s.* 181 *sub-s.* 1.

If a spouse commits adultery after he or she has been deserted, the desertion is not necessarily terminated as a matter of law, regardless of the question whether the deserting spouse knew of the adultery or whether it had any influence on his or her conduct.

If it is left in doubt whether the respondent knew of the adultery or, if known, whether his or her conduct was affected by it, the petitioner would fail to discharge the burden of proof. The question is to be determined according to the circumstances of each case. A spouse cannot be heard to say that adultery at which he or she has connived or to which his or her conduct has conduced is a reasonable cause for desertion.

Where a husband petitioning for divorce on the ground of desertion for at least three years immediately preceding the presentation of the petition had himself committed adultery within the three years' period, he was granted a decree nisi in the exercise of the discretion of the Court.

HUSBAND'S PETITION for divorce on the ground of desertion, with a plea for the exercise of the Court's discretion.

In this petition Mr. Frederick Ernest Herod, of Hampden Street, Nottingham, sought the dissolution of his marriage with Mrs. Florence Ethel Herod on the ground that she had deserted him without cause for upwards of three years immediately preceding the date of the petition (January 24, 1938). The petitioner prayed that notwithstanding his own adultery the Court should exercise its discretion in his favour.

The suit was undefended, and after hearing the evidence on July 1 the President adjourned it for argument on behalf of the King's Proctor on the question whether or not in law the petitioner's own adultery extinguished the wife's desertion.

Sir Donald Somervell A.-G. and *H. W. Barnard* for the King's Proctor.

S. E. Karminski for the petitioner.

Cur. adv. vult.

1938. July 28. THE PRESIDENT (SIR BOYD MERRIMAN) delivered a written judgment as follows :

This is a husband's petition for divorce under s. 176 (*b*) of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 2 of the Matrimonial Causes Act, 1937, on the ground that his wife has deserted him without cause for a period of at least three years immediately preceding the presentation of the petition. The petition includes a prayer for the exercise of the discretion of the Court in favour of the petitioner, notwithstanding his own adultery.

From a statement lodged in accordance with r. 28, sub-r. 1, of the Matrimonial Causes Rules, 1937, which the husband put in evidence in open Court at the hearing, it appears that from February 9, 1934, to December 23, 1937, when the association was broken off in view of this petition, he has committed adultery with his housekeeper, whom he desires to marry in the event of his obtaining a decree of divorce. From this statement of the facts, which I accept as correct, it follows that the petitioner has been living in adultery during practically the whole of the statutory period, and indeed this adulterous association had already begun before the statutory period. From the husband's evidence it appeared that the wife herself had confessed to an adulterous association, but that either because of the expense attached to the necessary investigations, or because of a promise to his wife, or for both reasons, the husband deliberately abstained from basing his petition on this ground. The husband's deliberate election to found his petition solely on the ground of desertion raises the question whether a petitioner who has committed adultery since the commencement of the alleged desertion and, in particular, during the three years immediately preceding the presentation of the petition, is precluded in law from alleging that he or she has been deserted without cause for the statutory period; or whether the law is that it depends upon the circumstances of the case whether such adultery is a defence to the charge of desertion or is merely a matter for the exercise of the discretion of the court.

As the question is one of general importance which affects a considerable number of pending petitions, I took the course, after hearing the evidence, of referring the matter to the King's Proctor under s. 181, sub-s. 1, of the Judicature (Consolidation) Act, 1925. The result is that I have had the advantage of hearing arguments by the Attorney-General and Mr. Barnard for the King's Proctor, and by Mr. Karminski for the petitioner, and I am very much obliged to counsel for their assistance. The question is a difficult one. That this is so will be understood from the fact that in the Commonwealth of Australia, where for some years Acts similar to that which I am considering have been in force, there has been an acute conflict of judicial opinion, culminating in a recent decision of the High Court of Australia, dismissing a petition on the ground that the adultery of the petitioner was an absolute bar. When I add that it is quite plain that in Scotland, where divorce for desertion has been the law for nearly four centuries, the petitioner could not possibly succeed on the facts of this case, and that in this country any petition based on the principles and rules of the Ecclesiastical Courts must also fail, while, under the purely statutory jurisdiction of the Court the point has never been the subject of direct decision, the difficulties do not diminish. Moreover, as all the arguments led to the same conclusion, I am not confident, even now, that I have not overlooked some point vital to a correct determination of the matter.

I find the facts to be as follows: The parties were married on April 6, 1912. In 1916 the wife confessed to having committed adultery, which the husband condoned. They lived together until August, 1927. From 1924 onwards the wife, who used to go out to dances with her husband, admitted that she was interested in another man, and intimated to her husband that if he did not like the way she was conducting herself he "could clear out." This, however, he refused to do.

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In August, 1927, the wife left the matrimonial home in Nottingham, ostensibly for a short holiday, but never returned. She wrote to the husband saying that she did not love him and was never coming back. Moreover, she left the child of the marriage, then nine years old, with the husband. He next saw her in 1932, when they met by accident in Nottingham. The husband suggested their coming together again. The wife said: "Definitely never—I have got some one else."

They met, with reference, I understand, to the child, on several occasions between 1932 and 1937. On one of these occasions the wife admitted that she was living in a house in Nottingham, and told her husband that a named man was keeping her, though he was not actually living with her at that house. At the last of these meetings, in November, 1937, the husband told the wife that he intended to file a petition for divorce on the ground of desertion as soon as the new Act came into force. He also told his wife that he had a housekeeper whom he wished to marry. He did not tell his wife that he had been committing adultery with this woman. Her comment was: "It is time you had a little happiness—"I wish you luck," and she begged him to keep out of the case the name of the man whom she had mentioned.

I have no reason to suppose that, if the question had been asked, the husband would have had any hesitation in telling his wife the real nature of his relations with his housekeeper; but I am satisfied that the question was not asked because the wife was completely indifferent on the subject. That this remained her attitude even when she was served with the petition, which, as I have said, contained a prayer for discretion, is clear from her answer to the process server when asked whether she would care to make any statement as to her reason for deserting her husband. Her reply was: "Only "that I found some one that I liked better, and I shall never "go back to him again."

Although this case is undefended, the point of law which emerges from the husband's own evidence requires the same consideration as if it had been put forward as an answer to the petition; and although I see no reason to doubt the husband's

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evidence and have found the facts accordingly, it must be understood that the King's Proctor has appeared only to assist the Court on the question of law, and is in no way precluded from making such inquiries into the facts as he may think necessary in the ordinary course of his duties.

The contention against the right of the petitioner to obtain a decree may be stated as follows: That adultery, however much the gravity of the offence may be mitigated by the circumstances, committed by a petitioner during the period, however prolonged, after the respondent has wilfully withdrawn from co-habitation, is an absolute answer to the allegation that "desertion without cause" subsists at any time thereafter, and this whether the fact is known or unknown to the respondent and whether or not it has any influence on his or her conduct; and that in such circumstances it follows that the question of exercising discretion in favour of the petitioner cannot arise.

This view of the matter is conveniently stated in the judgment of Mr. Justice Williams in *Douglas* v. *Douglas* (1): "It is just as well to state the principle. If a husband leaves "his wife he is doing wrong, if he leaves his wife without "excuse he is doing wrong by wilfully deserting her. But "that does not give her the right to relief unless he deserts "her for a period of five years continuously. That continued "desertion must be without just cause or excuse. If within "that five years the wife goes wrong, that is a just cause or "excuse for the husband keeping away, even if the husband "does not know it." It has also the weighty authority of a passage in the speech of Lord Herschell, Lord Chancellor, sitting in the House of Lords on a Scottish Appeal. In *Mackenzie* v. *Mackenzie* (2) Lord Herschell said: "It is not "necessary to decide the point, but I so far concur with this "view, that I think if a decree of adherence had been obtained "it would not have been competent for the spouse to rely on "any circumstance existing prior to the action of adherence "as a reasonable ground for desertion, and if for a period of "four years, during which the spouses were apart, an action

(1) (1903) 23 N. Z. L. R. 584. (2) [1895] A. C. 384, 389.

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"for adherence might at any time have been successfully "maintained, I do not think it would be possible to establish "that there was reasonable cause for desertion. At the same "time it appears to me that it would be essential for the party "suing for a divorce to show that he or she had during that "time used every reasonable endeavour to induce the other "to adhere, and been ready and willing to discharge on his "or her part all marital duties."

The rival contention was based on the fact that in the Act of 1937 adultery of the petitioner during the marriage is expressed to be a discretionary bar to obtaining a decree of divorce, without discriminating between the various grounds on which such a decree may be pronounced, and that, as desertion for the statutory period is, by itself, one such ground, it follows that the petitioner's adultery cannot be an absolute bar. It was also argued that cause for desertion can only be that which actually operates to produce the effect ; or in other words, that the question whether or not the continuance of the respondent's desertion is caused by the petitioner's adultery is to be decided subjectively and not objectively.

Though it may well be that the contention that adultery can only be a discretionary bar, and not a defence, to a petition based on desertion goes too far, it is manifest that there is no possible reconciliation between these conclusions, the methods of approach to which are fundamentally different. I have already referred to the conflict of judicial opinion on this subject in Australia. The statutes relating to divorce in the various States are worded somewhat differently from each other, and from the Matrimonial Causes Act, 1937 ; but so far as this point is concerned these differences do not appear to be essential. The Supreme Court of South Australia, for example, followed *Douglas* v. *Douglas* (1) in *Cook* v. *Cook* (2), and decided in the opposite sense in *Gilbert* v. *Gilbert* (3). In the Supreme Court of Victoria and the Supreme Court of Queensland *Douglas* v. *Douglas* (1) was either distinguished, or

(1) (1903) 23 N. Z. L. R. 584.
(2) [1934] South Australian S. R. 298.
(3) [1937] South Australian S. R. 79.

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not followed, in *Gray* v. *Gray* (1) and *Hopkins* v. *Hopkins* (2). Finally, the High Court of Australia in *Gilbert* v. *Gilbert* (3) (supra) by a majority composed of Dixon, Evatt and McTiernan JJ., Latham C.J. dissenting, overruled the Supreme Court of South Australia and decided in accordance with the principle laid down in *Douglas* v. *Douglas*. (4)

That the question was essentially the same as that with which I have to deal appears from the wording of the South Australian Matrimonial Causes Act, 1929 (No. 1946). In s. 6 this particular ground for divorce is expressed simply as "(*c*) Desertion for five years." In earlier statutes the words "without just cause or excuse" appeared; but it has been said that they were deliberately omitted from the current Act as being surplusage: see *Cook* v. *Cook* (5) and *Gilbert* v. *Gilbert* (6) (supra). By s. 7 of the Act judicial separation may be obtained amongst other grounds for: "(*c*) desertion for two "years; (*d*) failure to comply with an order for restitution of "conjugal rights; (*e*) any ground on which a decree of divorce "a mensa et thoro might have been pronounced prior to the "Imperial Matrimonial Causes Act, 1857." By s. 12, sub-s. 1, the Court may refuse to make an order if the plaintiff has been guilty of, amongst other things: "(*a*) adultery not condoned." The discretionary bars set out in this section appear to apply equally to an order for judicial separation as to an order for divorce.

Most unfortunately the full report of the judgments in the High Court of Australia in *Gilbert* v. *Gilbert* (3) is not yet available in this country. I have, however, seen a short digest of the judgments in the Australian Law Journal. From this it appears that the majority of the Court founded their judgments upon the principles of the Ecclesiastical Courts, whereas Latham C.J. held that the natural effect of the words of the statute should not be limited by considerations derived from

(1) [1925] Queensland S. R. 166.

(2) [1936] Victoria L. R. 218.

(3) Australian Law Journal, vol. 11, p. 347; since reported nom. *Crown Solicitor* (*S.A.*) v. *Gilbert* 59 C. L. R. 322.

(4) 23 N. Z. L. R. 584.

(5) [1934] South Australian S. R. 298.

(6) [1937] South Australian S. R. 79

the manner in which the Ecclesiastical Courts exercised a different jurisdiction. As I am deprived by the exigencies of the calender of the advantage of reading the judgments given in the High Court of Australia it would be unprofitable to examine in detail the decisions of the several State Courts which must necessarily have been reviewed in those judgments. Moreover, I am naturally most anxious to avoid even the faintest appearance of criticizing any judgments in their relation to local statutes, with which I have no concern except in so far as they assist me in the solution of a similar problem. But I should like to say that I have read with great care all the judgments in the cases to which I have referred and that they have been of the greatest assistance to me in forming my own judgment on this difficult question.

I will only make one quotation which expresses succinctly the view opposed to that adopted by the majority of the High Court of Australia. In *Hopkins* v. *Hopkins* (1) the following passage occurs in the judgment of Lowe J.: "Once the view "expressed above is taken, it is apparent that the adultery of "the petitioner, unknown to the respondent, cannot be a cause "of his continuing to desert her, and hence cannot afford him "just cause or excuse for doing so. Indeed the petitioner's "adultery, of which he knows, is not necessarily such cause or "excuse, for he may be shown to have overlooked it, and it "may be proved that his continued desertion was for reasons "apart from the petitioner's conduct."

In the argument before me this contention was supported by reference to some observations of the late Lord Sumner in *British Columbia Electric Ry. Co.* v. *Loach.* (2) Lord Sumner, after setting out the various epithets such as "effective," "real," "proximate," "direct," "decisive" and "immediate," which it had been customary to attach to the word "cause," said that it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of "the cause," simply and without qualification. It is true that in *Weld-Blundell* v. *Stephens* (3)

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(1) [1936] Victoria L. R. 221.
(2) [1916] A. C. 719, 727.
(3) [1920] A. C. 983.

Lord Sumner, while saying that it was tautologous to speak of "effective cause," permitted himself the luxury of attaching the epithet "direct," which was one of those which he had formerly rejected, but without affecting the point that, with or without an epithet, "cause" must be that which operates to produce the effect. But I am not convinced that an argument turning upon the use of the word "cause" is really helpful, for by authority by which I am bound the process of simplification has been carried still further. In *Frowd* v. *Frowd* (1)—a decision of the Divisional Court—Sir Francis Jeune P., said "The expression desertion 'without reasonable excuse' "in the Matrimonial Causes Act, 1857, ss. 27, 31, and the "equivalents of that expression 'without just cause' or 'without "'good cause,' have always struck me as somewhat loose "and inaccurate language. Desertion means the cessation of "cohabitation brought about by the fault or act of one of the "parties. Therefore the conduct of the parties must be "considered. If there is good cause or reasonable excuse, "it seems to me there is no desertion at all in law." See also *Oldroyd* v. *Oldroyd* (2) and *Synge* v. *Synge* (3). One is brought back, therefore, to the question whether "desertion" can subsist in law at a time when the other spouse has, in fact, been guilty of a fundamental breach of the obligations of marriage.

I turn now to the Matrimonial Causes Act, 1937. It is to be observed first of all that the statutory period is one of three years relating backwards from the presentation of the petition, and not forwards from the date of the commencement of the desertion. But this does not mean that the period of three years is to be isolated from the history of the desertion of which it forms a part. It means that the petitioner must establish a state of things amounting originally to desertion, and must also prove that that state of things has continued, whenever it began, throughout the three years immediately preceding the presentation of the petition. In this respect it differs from the statutory periods under the Matrimonial Causes Act, 1857,

(1) [1904] P. 177, 179.
(2) [1896] P. 175, 182.
(3) [1900] P. 180, 193.

and the Judicature Act, 1925, respectively, in that the period cannot be completed until the presentation of the petition. It follows that it is immaterial whether the adultery which is said to terminate the desertion was committed within the last three years or earlier in the history of the desertion. In either case it would be equally fatal.

But I am invited to draw the conclusion that because by s. 2 of the Act of 1937 desertion alone is, for the first time, made a substantive ground for divorce, whereas by s. 4 adultery is made a discretionary bar only without discriminating between the several grounds of divorce, it follows that desertion and adultery are mutually independent offences and that adultery on the part of the petitioner cannot be an answer to the charge of desertion but calls only for the exercise of discretion. I am not much impressed by this argument. It is true that "desertion" is made a substantive ground for divorce and that adultery "during the marriage" is a discretionary bar only; but in relation to a petition for desertion this latter provision would be apt to refer to the common case of adultery antecedent to the alleged desertion and already condoned. It does not seem to me that the mere fact that desertion now stands alone as a ground for divorce throws any light on the meaning of desertion. Ever since the Act of 1857 desertion for the requisite period has, coupled with adultery, been a ground on which the wife can obtain the statutory relief of dissolution. Desertion "without reasonable excuse," or "without cause," or for that matter "desertion" simply (see *Frowd* v. *Frowd* (1)), must be the same offence whether or not it is necessary to couple it with adultery. What is really important, therefore, is to see whether adultery on the part of a wife petitioner was or was not held to prevent her from establishing desertion for two years or upwards where that offence, coupled with adultery, was a necessary ingredient in her petition for divorce.

But, before passing from s. 4 of the Act of 1937, there is one respect in which the proviso may throw some light on the question. In all the earlier statutes "such wilful neglect or

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(1) [1904] P. 177, 179.

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"misconduct on the part of the petitioner as has conduced "to the adultery" has figured as a discretionary bar; and this phrase has always been held to mean such wilful neglect or misconduct as is proved to have brought about the adultery. It is easy to see the reason for extending this discretionary bar to a petition on the ground of unsoundness of mind as is done by para. (*d*) of the proviso to the new s. 178. It is less easy to understand its extension to desertion, and counsel have been unable to explain how wilful neglect or misconduct can bring about that which is expressly stated to be "without cause," even if such wilful neglect or misconduct on the part of the petitioner does not actually make him or her the deserting instead of the deserted spouse. If, however, it is permissible to draw an indirect inference from a phrase, the meaning of which is obscure, it does suggest that if misconduct which can properly be described as conducing to desertion is merely to be a discretionary bar, a fortiori should misconduct, even adultery itself, which has in fact had no influence whatever on the inception or continuance of desertion, be so regarded.

In considering the statutory provisions regarding desertion it may be useful to begin by inquiring what is the nature of desertion in English Law. Desertion is not defined in any statute. It may well be that Parliament refrained from giving a definition for the wise reason given by Lord Merrivale P., in *Jackson* v. *Jackson* (1) when, after disclaiming any attempt to give an exhaustive definition of desertion he says: "No judge, so far as I am aware, has sought to do so, "and certainly there is no prospect of its being successfully "done." He added: "There is a constant change in the modes "in which people refuse to perform their elementary duties, "and it might be helped by some mechanical statement of "what does amount to desertion." But in the preceding sentence Lord Merrivale P. set out a description of desertion which, even if it is not exhaustive, is very useful. He says: "If there is abandonment by one of the spouses of the "other, that is desertion. If one of the spouses causes the "other to live separate and apart, that is desertion"; and

(1) [1924] P. 19, 23.

I have already quoted a passage containing another description, by Sir Francis Jeune P., who said: "Desertion "means the cessation of cohabitation brought about by the "fault or act of one of the parties": *Frowd* v. *Frowd.* (1)

These descriptions make it clear that the intention wrongfully to bring the cohabition to an end is an essential element in the offence of desertion. If further authority is needed see *Pulford* v. *Pulford* (2) and the observations of Sir Ernest Pollock M.R. in *Thomas* v. *Thomas* (3) and *Bowron* v. *Bowron* (4). A spouse wilfully withdrawing without excuse from the matrimonial home, and a spouse so misconducting himself or herself as to lead to the natural consequence that the other spouse withdraws from the matrimonial home, must equally be taken to intend wrongfully to bring the cohabitation to an end. But in order to succeed under the Act of 1937 a petitioner must not only prove the original intention, but must also prove that this intention has persisted during the requisite period and still persists up to the moment of the presentation of the petition. Now a spouse wrongfully withdrawing from cohabitation may repent and return at any time to cohabitation: see *Jones* v. *Newtown and Llanidloes Guardians* (5) per Reading C.J. and per Shearman J. A spouse guilty of such misconduct as to drive the other away, though a mere offer to resume cohabitation will not suffice, may couple with it such assurances of better behaviour as to put an end to the desertion: see *Thomas* v. *Thomas* (6) per Warrington L.J., *Bowron* v. *Bowron* (7) per Scrutton L.J. It follows that in a case of "constructive" desertion, of which the two cases last cited are excellent examples, the onus of proving that the intention to desert continues may be much lighter than in a case of mere withdrawal from cohabitation.

Indeed, as is pointed out by Scrutton L.J. in the case of *Bowron* v. *Bowron* (7), the facts may be such that the intention may be presumed to continue. But it is manifest that the deserter's intention, whether to repent and make

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(1) [1904] P. 177, 179.
(2) [1923] P. 18.
(3) [1924] P. 194, 199.
(4) [1925] P. 187, 192, 193.
(5) [1920] 3 K. B. 381, 384, 385.
(6) [1924] P. 194, 201.
(7) [1925] P. 187, 195.

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amends on the one hand, or to persist in desertion on the other, may be affected by the adultery of the deserted spouse ; and, to take a not uncommon example of desertion, if nothing more was proved than that the respondent had left the home and that the petitioner shortly afterwards had set up an adulterous association continued down to the time of the presentation of the petition, it might be well-nigh impossible for the petitioner to discharge the burden of proof. But whether the burden is lighter or heavier according to the circumstances of the particular case, it seems to me to be impossible to hold that adultery of which the deserter is proved to be entirely ignorant, or to which, if it is known, he or she is proved to be entirely indifferent, can have affected his or her own intention in the matter, which must, therefore, in my opinion, be judged from his or her own conduct and declarations and not solely from the conduct of the petitioner.

Where the intention of a wrongdoer is in issue, the real existence of a state of things, believed by him to exist, is not always an essential element in the proof of intention. For example, a soldier is guilty of desertion, as contrasted with mere absence without leave, if, having been warned for some important service, he deliberately absents himself in order to evade that service, though he may intend ultimately to return to his regiment. If, having been warned for an attack on a particular date, he absents himself with the intention of evading it, the fact that the attack is cancelled or postponed without his knowledge cannot affect the quality of the offence. So also may the man who intends to pick a pocket, which is, in fact, empty, be found guilty of the attempt, notwithstanding the impossibility of carrying out his intention. What is material in such cases is not the actual state of facts assumed by the accused to exist, but his own state of mind. As Bowen L.J. said in *Edgington* v. *FitzMaurice* (1) : "the state "of a man's mind is as much a fact as the state of his digestion. "It is true that it is very difficult to prove what the state of "a man's mind at a particular time is, but if it can be ascer- "tained it is as much a fact as anything else."

(1) (1885) 29 Ch. D. 459, 483.

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The intention may be proved by his own declarations, or inferred from his conduct. If the intention permanently to break up the matrimonial home is established either by the wrongdoer's own declarations or because his conduct has been such as to lead to the conclusion that he must have intended that result, it seems to me that he is guilty of desertion; and that he continues to be so, notwithstanding that the other spouse has been guilty of a breach of the matrimonial obligations which is proved to have had no influence on his intention.

It may be said that this line of reasoning would enable a spouse whose adultery, not condoned, had preceded the alleged desertion to obtain a decree at the discretion of the Court, whereas such adultery at least ought on principle to be held to cause or excuse the desertion. But, in my opinion, precisely the same consideration applies. If it is left in doubt whether the respondent knew of the adultery or, if known, whether his or her conduct was affected by it, the petitioner would fail to discharge the burden of proof. But, if it were established that the respondent's intention to withdraw from cohabitation was formed entirely independently of the petitioner's misconduct, the offence would be proved. The question is to be determined according to the circumstances of each case. I do not think that a spouse could be heard to say that adultery at which he or she has connived or to which his or her conduct has conduced, is a reasonable excuse for desertion.

Apart from such a case it must be rare that antecedent adultery, known to the alleged deserter, has neither been condoned nor has affected the intention to withdraw from cohabitation. It may be that, in the case where the alleged deserter's intention has been entirely unaffected even by the suspicion of antecedent adultery, he or she has nevertheless been actuated in withdrawing from cohabitation by conduct or neglect on the part of the other spouse, which is in truth a consequence of that spouse's adulterous association. If so, it is in that conduct or neglect, not in the adultery itself, that the cause or excuse for the alleged desertion must be found. If, however, the intention to desert is entirely unaffected either by the adultery or any other misconduct or neglect on the part of the other spouse, the result, in my opinion, is that desertion is proved, and that the adultery of the petitioner is a discretionary bar and not an absolute defence.

However that may be in the case of adultery preceding the desertion—and I have only referred to it because it is necessary, as far as possible, to consider all the implications of this question--in the case of adultery subsequent to the inception of the desertion, with which I am really concerned, Parliament, from the Act of 1857 onwards, has always made "desertion "without reasonable excuse" a discretionary bar to a petition based on such adultery. I recognize on the one hand that the omission of any reference to desertion subsequent to the adultery complained of may have been due to the belief that there was, in law, no such thing, and on the other hand, that as the desertion is described in the past tense and without reference to any period it does not necessarily follow that it is to be regarded as persisting after the adultery complained of. But this provision seems to me to be at least equally consistent with the view that, at any rate as regards adultery subsequent to desertion, the adultery and the desertion may be independent offences, and that, according to the circumstances of the particular case, each may be a discretionary bar to a petition based on the other.

I will now consider three cases decided under the Matrimonial Causes Act, 1857, which seem to me to be of very great importance. By way of preface I must observe that, although they were all cases in which a wife based her petition on adultery coupled with desertion and invoked the discretion of the Court in respect of her own adultery, the point which I am now deciding was not discussed, in spite of the fact that the King's Proctor intervened in two of them. The argument in the latter cases turned not upon the question whether there was jurisdiction to exercise discretion at all because the desertion had been terminated by the petitioner's adultery, but upon the propriety of exercising discretion in the circumstances of the case. In all three cases the jurisdiction to exercise discretion was assumed. It is also the fact that in none of the cases was attention directed to the question whether the statutory period was already completed before the commission of the adultery.

In *Symons* v. *Symons* (1) the facts, as stated in the headnote, were that a husband who had treated his wife with great cruelty during cohabitation finally deserted her and went to live with another woman. More than seven years after the desertion the wife, not knowing whether her husband was alive and without making inquiry, commenced to live with another man. The cohabitation continued long after the time that it came to the wife's knowledge that her husband was alive. Subsequently, and after the wife had ceased to live in adultery, her husband was convicted under the Criminal Law Amendment Act, 1895, of an aggravated offence on a young girl not amounting to rape, which latter offence would by itself have entitled her to petition for divorce. In a full judgment Sir Francis Jeune P. gave his reasons for deciding to exercise his discretion in the wife's favour. I need only refer to two of them. He said (2): "Secondly, the "misconduct of the petitioner certainly did not conduce "to the misconduct of the respondent. This, however, is a "consideration of negative rather than positive weight." He said (3): "Fourthly, I now come to what I regard "as the circumstances of most weight in this case. I have no "doubt that the husband's adultery and cruelty before his "desertion, and his prolonged desertion, were the main causes "of the wife's adultery, and he was guilty, therefore, of "misconduct conducing to her adultery. So far as I know, "this has not yet been decided to be one of the circumstances "on which the discretion to allow a divorce may be exercised." But he came to the conclusion after very careful consideration that it was safe and proper to hold that this was one of the circumstances which he ought to take into account in deciding to exercise discretion in the wife's favour.

The next case is that of *Hunter* v. *Hunter*. (4) The wife had obtained a decree nisi upon disclosing adultery, said to

(1) [1897] P. 167.
(2) Ibid. 172.
(3) [1897] P. 167, 174.
(4) [1905] P. 217; 74 L. J. (P.) 157.

have been committed at a time after she believed her husband, who had deserted her, to be dead. The King's Proctor intervened on the ground that she had failed to disclose earlier adultery, as a result of which a child was born, and that the circumstances of the registration of its birth tended to negative her story that she had believed her husband to be dead. Neither in the argument, nor in the judgment, as I have said already, was any stress whatever laid upon the question whether the adultery, which was the subject of the intervention by the King's Proctor, had or had not been committed within two years of the commencement of the desertion. From a consideration of the dates, as found by Sir Gorell Barnes P., which are most clearly set out in the summary of facts in the Law Journal Reports, it is apparent that she was, in fact, guilty of adultery within the two years period.

In the case of *Hale* v. *Hale* (1), discretion was exercised by Bargrave Deane J. in favour of a wife who undoubtedly began an adulterous association within two years of the desertion by her husband.

With regard to the point that no notice was taken of the relation between the date of the adultery and the period of the desertion I am convinced that the explanation is not that this consideration was overlooked, but that it was regarded as immaterial. It is true that once the statutory period of two years had elapsed the offence of desertion was completed, so that it could, for example, be revived by a subsequent offence, even after cohabitation had been resumed: see *Blandford* v. *Blandford* (2). But it is quite another thing to suppose that it was constituted irrevocably for all purposes so that on the one hand, the deserter could have no locus penitentiae though the deserted spouse refrained from taking action, or that, on the other hand, the completion of the period could operate, so to speak, as a licence to commit adultery. In my opinion if the petitioner's adultery necessarily put an end to desertion it would have been held to do so whether committed in or after the statutory period.

It is true that these cases lead to the apparently absurd

(1) (1915) 32 Times L. R. 53.

(2) (1883) 8 P. D. 19.

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conclusion that under the Act of 1857 an adulterous wife could obtain a divorce for desertion for two years or upwards coupled with adultery, though she could not obtain a decree for judicial separation for the same desertion alone. It is, of course, unquestionable that the Ecclesiastical Courts would not allow an adulterous spouse to petition either for divorce a mensa et thoro or for restitution of conjugal rights, which was the only remedy open to a deserted spouse, the offence of desertion, as such, being a creature of the Act of 1857; and it is equally clear that the Divorce Court, after the Act of 1857, was precluded in such a case from entertaining not only a restitution suit but a petition for judicial separation: see *Otway* v. *Otway* (1). This was so even in a case where the petitioner's adultery was brought about by the procurement or connivance of the other spouse: see *Everett* v. *Everett*. (2) It is quite true that in *Otway* v. *Otway* (3) Cotton L.J. does appear to go further and to lay down that an adulterous petitioner was not in a position to ask for any relief which might be granted by the Divorce Court. It must be taken, however, from the earlier part of his judgment, that he was referring only to relief equivalent to that which could have been granted by the Ecclesiastical Courts. If he intended to refer to divorce, the observation must be regarded as obiter and contrary to authority.

Curiously enough in *Symons* v. *Symons* (4) Sir Francis Jeune P., in arguing by analogy to the Summary Jurisdiction (Married Women) Act, 1895, falls into the converse error when he says that he cannot suppose that it was intended that a married woman should be placed in a totally different position in regard to a separation under that Act from her position in regard to "a separation or" divorce in the High Court. But, as he was comparing the statutory relief of divorce with the statutory relief under the Summary Jurisdiction Act, the words quoted are also obiter. The analogy itself is destroyed, however, by the fact that the power to grant the summary relief of a separation order is expressly given in

(1) (1888) 13 P. D. 141.
(2) [1919] P. 298.
(3) 13 P. D. 141, 150.
(4) [1897] P. 167, 176.

circumstances in which the relief of judicial separation would be precluded: see *Everett* v. *Everett* (1).

But adultery on the part of a petitioner would have been equally fatal to a petition for judicial separation if it had been, for example, an adulterous husband who was seeking for relief in respect of his wife's adultery, or if it were an adulterous wife seeking for relief on the ground of her husband's adultery, or of his cruelty as the case might be. This follows from ss. 16 and 22 of the Matrimonial Causes Act, 1857, by the latter of which the Court is enjoined "In all suits and proceedings, "other than proceedings to dissolve any marriage, the said "Court shall proceed and act and give relief on principles and "rules which in the opinion of the said Court shall be as "nearly as may be conformable to the principles and rules "on which the ecclesiastical courts have heretofore acted "and given relief." The same result has been regarded as following from the wording of s. 185, sub-ss. 1 and 2, of the Judicature Act, 1925. In my opinion, whatever was the position as regards recrimination to a charge of adultery, the true conclusion is that uncondoned adultery was a bar to a petition for judicial separation, whether for desertion or cruelty, not because it was necessarily a defence to the new statutory offence of desertion, any more than it was necessarily a defence to a charge of cruelty, but because, by the principles of the Ecclesiastical Courts, a petitioner must come before the Court with clean hands: see *Drummond* v. *Drummond* (2) and *Otway* v. *Otway* (3).

But whether or not I have stated the Ecclesiastical principle correctly, it is really inconceivable, if the subsequent adultery of a deserted wife was recognized as constituting an absolute defence to the charge of desertion, as distinct from disentitling her to sue, that the point should have been ignored by three different judges of this Division, as well as by the King's Proctor and his counsel.

Curiously enough I can only find one instance where this point is mentioned in an argument of counsel, namely in the

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(1) [1919] P. 298.
(2) (1861) 30 L. J. (P. M. & A.) 177.
(3) (1888) 13 P. D. 141.

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case of *Brooking-Phillips* v. *Brooking-Phillips.* (1) This was a wife's petition for restitution of conjugal rights in which the husband alleged that the wife had committed adultery but asked for no relief. The wife, while denying her adultery, recriminated with a charge of adultery by the husband. It was held that this recrimination must be struck out as irrelevant. In support of the wife's right to recriminate it was argued that if she did not make the charge against her husband then, she would never be able to do so. In answer to this argument that very experienced practitioner, the late Mr. Le Bas, is reported to have said: "It is said that if the wife cannot "raise the question now she can never do so. That is not "true, because she can get a divorce on the ground of her "husband's adultery and desertion." As the material dates were that the wife was alleged to have been guilty of adultery with one man in 1905 and with another in 1910 and to have been deserted by her husband in 1911 the significance of the argument is clear. It is hardly to be supposed that such an argument could have been addressed to the Court of Appeal if it was recognized by practitioners that it was impossible for an adulterous wife to allege that she had been deserted.

Though it is unnecessary expressly to decide the question, I think that the real change made by the Matrimonial Causes Act, 1937, is not to alter the nature of desertion, but, as a result of s. 5, to assimilate the reliefs of judicial separation and divorce by making both subject only to the statute, and independent of the principles and rules upon which the Ecclesiastical Courts acted, while at the same time preserving any grounds for relief which were open in the Ecclesiastical Courts.

With regard to the passage in Lord Herschell's speech in *Mackenzie* v. *Mackenzie* (2) quoted above, it appears to me that it is impossible to draw any analogy from the Scots law of desertion. This depends upon the Statute of 1573. I am not, of course, presuming to lay down Scots law, more especially as, until I myself called attention to this passage, no reference was made in the argument to this aspect of the question. But from such investigation of the authorities as I have been able to make I have come to the conclusion that an appreciation of the more obvious differences between the two systems of law does assist in the solution of the problem, and not less so because some of the judgments in the Australian Courts are founded on this particular extract from Lord Herschell's speech.

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(1) [1913] P. 80.

(2) [1895] A. C. at p. 389.

As regards divorce for adultery, it appears that the doctrine of recrimination has for a long time ceased to form part of the law of Scotland. The adultery of the petitioner is neither a matter for recrimination, nor is it a discretionary bar to an action for adultery. It must be raised, if at all, by a counter-action. In such a case, if it is established that both spouses are guilty, each obtains a decree. The adultery of the respective spouses may affect the consequential reliefs flowing from the decree, but is no bar to the dissolution of the marriage. This essential distinction between Scots law and the English law under the Matrimonial Causes Act, 1857, appears clearly from Lord Fraser's Treatise on Husband and Wife, 2nd ed., vol. ii., at pp. 1196 to 1199.

As regards divorce for desertion, it appears to be settled law that adultery of the pursuer committed after the commencement of the desertion is an absolute bar to relief. And there is authority that this is so whether the adultery was committed during or after the quadrennium: see *Auld* v. *Auld* (1), *Scott* v. *Scott* (2) and *Gilfillan* v. *Gilfillan* (3); and even though the pursuer believed the defender to be dead and the adultery consisted of a " re-marriage " in relation to which this belief would have afforded an answer to a charge of bigamy, unless possibly the pursuer's belief in the death of the defender, or the continuance of that belief, was brought about by the fraudulent contrivance of the defender, so that he would be barred from relying on the adultery: see *Hunter* v. *Hunter* (4).

I can find no case in which the defender's knowledge of the adultery was referred to as a material circumstance. The

(1) (1884) 22 Sc. L. R. 26.
(2) 1908 S. C. 1124.
(3) (1931) Sc. L. T. 454.
(4) (1900) 2 Fraser, 771.

reason why adultery of the pursuer is an absolute bar to relief appears to be that, though desertion is a convenient term to express the matrimonial offence created by the Act of 1573, the statutory ground for divorce is non-adherence, and adultery automatically terminates non-adherence. This is still so, though by the Conjugal Rights (Scotland) Amendment Act, 1861, it is no longer necessary, as a matter of procedure, to institute an action of adherence as a preliminary to suing for divorce: see *Auld* v. *Auld* (1), and *Mackenzie* v. *Mackenzie* (2), per Lord Herschell. It is quite plain that it would have been impossible to pronounce decrees of divorce in the cases of *Symons* v. *Symons* (3), *Hunter* v. *Hunter* (4) and *Hale* v. *Hale* (5), if it had been necessary for the petitioner to couple with adultery desertion as that term is understood in Scots law.

On the other hand, as I have already said, the offence of desertion as such was unknown to the Ecclesiastical Courts. The remedy for wrongful withdrawal from cohabitation was a decree for restitution of conjugal rights. To this, as to an action for non-adherence, adultery of the petitioner would have been an absolute bar. It is true that by s. 5 of the Matrimonial Causes Act, 1884, a respondent who failed to comply with a decree for restitution of conjugal rights was thereupon " deemed to have been guilty of desertion without "reasonable cause " and the petitioner might forthwith proceed for a judicial separation, or, if the respondent was a husband who had also been guilty of adultery, for divorce, notwithstanding that two years had not elapsed since such failure. To a restitution suit, as a preliminary either to a judicial separation or to divorce the bar of adultery would of course apply. But though a petitioner was enabled to avoid having to wait two years by taking advantage of this provision—which as regards divorce, at any rate, no longer survives by reason of the revised form in which ss. 176 and 185, sub-ss. 1 and 2, are re-enacted by ss. 2 and 5 of the Matrimonial Causes

(1) 22 Sc. L. R. 26.
(2) [1895] A. C. at p. 389.
(3) [1897] P. 167.
(4) [1905] P. 217.
(5) 32 Times L. R. 53.

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Act, 1937—it was never a condition precedent to a suit for the statutory offence of desertion in this country that the petitioner should obtain a decree for restitution, as before 1861 it was a condition in Scotland that a decree of adherence should be obtained ; nor was it ever the law that a petitioner in respect of desertion should be able to prove that throughout the statutory period he or she was ready and willing to render conjugal rights.

From the earliest days after the offence of desertion was created by the Matrimonial Causes Act, 1857, the Courts of this country recognized "constructive desertion" and the right of the offended spouse to refuse to return to cohabitation in the absence of such assurance of future good behaviour as would suffice to bring the desertion to an end. It appears that anything resembling the doctrine of constructive desertion was at one time rejected as being unknown to Scots law ; and it was held that if a wife live apart because of fear of her husband's ill-treatment she could not be regarded as willing to adhere, and the spouses must be treated as living apart by mutual consent : see *Bowman* v. *Bowman.* (1) But it is evident from more recent decisions that greater latitude is now allowed in defining the circumstances from which the willingness of the deserted spouse to adhere can be inferred, and in absolving him or her from the necessity of prior remonstrance : see *Mulherron* v. *Mulherron* (2), and *Woodhouse* v. *Woodhouse.* (3) But one has only to appreciate the nature of the controversy which provoked differences of judicial opinion, for example, in *Gibson* v. *Gibson* (4) and *Murray* v. *Murray* (5) and in *Mulherron* v. *Mulherron* (2), to realize the essential difference between the English and Scots law relating to desertion : see *Harriman* v. *Harriman* (6) per Buckley L.J., *Thomas* v. *Thomas* (7), and *Bowron* v. *Bowron* (8) per Scrutton L.J.

It seems to me, therefore, that to apply to the statutory offence of desertion in this country passages such as those quoted from *Mackenzie* v. *Mackenzie* (9), because in common

(1) (1866) 4 Macpherson 384.
(2) 1923 S. C. 461.
(3) 1936 S. C. 523.
(4) (1894) 21 R. 470.
(5) (1894) 21 R. 723.
(6) [1909] P. 123, 148.
(7) [1924] P. 194.
(8) [1925] P. 187, 195.
(9) [1895] A. C. at p. 389.

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parlance "divorce for desertion" is now the law on both sides of the Tweed, would be perilously like indulging in the fallacy of constructing a syllogism with an undistributed middle term.

To return to the principle stated in the case of *Douglas* v. *Douglas* (1), although, as appears from the report itself, the passage which I have already quoted was obiter, and although, apart from this fact, it is no more binding on the Courts in Australia than it is in this country, it has naturally been treated as an authoritative statement of principle by a very distinguished judge. In the following observations I must not be taken to be expressing the slightest doubt that it correctly expresses the law of New Zealand. But supposing, for the sake of argument, that it had been intended to express the English law it would be open to the following criticisms: The first half of the first sentence is too general. A husband is justified in leaving his wife for good cause and may nevertheless be the deserted spouse. As regards the last sentence it appears from what has already been said that no warrant for qualifying the wife's wrong-doing by limiting it to the period of the five years for which the husband's desertion must continue can be derived either from the principles of the Ecclesiastical Courts before 1857, since there was no offence of desertion; or from the principles of the Ecclesiastical Courts as applied by the Divorce Court to the statutory relief of judicial separation on the ground of desertion without cause for two years or upwards, since it is clear that adultery committed by the petitioner at any time would have been held to be an absolute bar; or from the principles of the Scots law of desertion, as it is clear that the adultery of the petitioner would be an absolute bar whether it was committed during or after the quadrennium; or from the principles on which the Divorce Court has acted in exercising the statutory discretion to grant the statutory relief of divorce for the statutory offence of desertion for two years coupled with adultery, since that discretion has been exercised both where the deserted wife's adultery was committed during the statutory period: see

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(1) (1903) 23 N. Z. L. R. 584.

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Hale v. *Hale* (1) and *Hunter* v. *Hunter* (2); and where it was committed after that period had elapsed: see *Symons* v. *Symons.* (3)

In my opinion, although there is abundant authority that an adulterous petitioner was barred from certain forms of relief in respect of desertion, there is no authority binding this Court for the principle that if a spouse commits adultery after he or she had been deserted, the desertion is necessarily terminated as a matter of law regardless of the question whether the deserter knows of the adultery or whether it has any influence on his or her conduct. I am not prepared to adopt any such principle. Nor am I prepared to be guided by those judgments in the Australian Courts, which expressly or by implication are founded either on this statement of principle, or on the passage I have quoted from the speech of Lord Herschell in *Mackenzie* v. *Mackenzie* (4) delivered in relation to the Scots law of desertion. On the contrary, I am of opinion that the cases of *Symons* v. *Symons* (3), *Hunter* v. *Hunter* (2) and *Hale* v. *Hale* (1), regarded in their setting as examples of the contrast between the jurisdiction depending solely upon the Act of 1857 and that expressed to depend upon the principles of the Ecclesiastical Courts, afford direct authority for the proposition that the adultery of a petitioner, committed after desertion by the respondent, does not necessarily terminate that desertion, and, if the circumstances are such that it is held not to do so, that it is merely a discretionary bar to a decree of divorce.

The Matrimonial Causes Act, 1937, marks still more clearly the divergence from the principles of the Ecclesiastical Courts, not only in abolishing the necessity for coupling adultery with desertion as a ground for divorce, but in basing the relief of judicial separation expressly on the statutory grounds without reference to those principles. I can find no reason for coming to a different conclusion under this Act merely because the statutory period is to be reckoned from a "terminus ad quem" instead of from a "terminus a quo."

(1) 32 Times L. R. 53.
(2) [1905] P. 217.
(3) [1897] P. 167.
(4) [1895] A. C. at p. 389.

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It only remains to apply the law as I understand it to the facts of this case. Finding, as I do, that the wife was probably unaware of and certainly was in no way affected or influenced by the husband's adultery, and that, on the contrary, if the wife's desertion cannot be said to have brought it about, his adultery is somewhat excused by the circumstances in which he found himself, and because it is in the interests of decency that he should be able to marry the woman in question, I shall exercise my discretion in his favour and pronounce a decree nisi.

Solicitors: *The King's Proctor*; for the petitioner: *Peacock & Goddard, for Rothera, Sons & Husbands, Nottingham.*

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Oct. 31; *Nov.* 1.

Shipping—International law—Comity of Nations—Immunity from arrest—Impleading a foreign sovereign state—Arrest by Republican Government of Spain of vessel requisitioned by Nationalist Government—De facto and de jure governments—Possession—Vessel already under arrest—Custody of Admiralty marshal.

In pursuance of a decree dated June 28, 1937, a Spanish ship registered at Bilbao, after that port had been captured by General Franco's forces, was requisitioned by the Republican Government. The vessel was not then in Spanish territorial waters. On her arrival in the Thames her owners issued a writ in rem for possession; she was arrested by the Admiralty marshal, and at all material times remained under arrest. On April 5, 1938, she was requisitioned by the Nationalist Government, and the master and managing director of the owners made declarations that they held the vessel at the disposal of the Nationalist Government. Thereupon, the Republican Government issued a writ in rem claiming possession of the vessel and served a warrant of arrest on her. The Nationalist Government entered an appearance under protest and moved to set aside the writ and arrest on the ground that the action impleaded a foreign sovereign state—namely, the Nationalist Government of Spain.

The Foreign Office stated that no other government except the Government of the Spanish Republic was recognized by His Majesty's Government as the de jure Government of Spain, but that His Majesty's Government recognized the Nationalist Government as a government which exercised de facto administrative control over the larger portion of Spain, and that the Nationalist Government was not a government subordinate to any other government in Spain.

On these facts Bucknill J. set aside the writ and warrant of arrest. On appeal:—

Held, that the answers of the Foreign Office required the Court to say that His Majesty regarded the Nationalist Government of Spain as the government of a foreign sovereign state, and, assuming that it was right to say that the legal possession was in the Admiralty marshal, the Nationalist Government had nevertheless shown sufficient interest in the ship to compel them to come before the Court to defend that interest, and, therefore, that they were impleaded by the action, and, as they were a government of a sovereign state, that the writ and warrant of arrest must be set aside.

Judgment of Bucknill J. [1938] P. 233, affirmed.

APPEAL from a judgment of Bucknill J. setting aside, on the motion of the Nationalist Government of Spain, a writ in rem and warrant of arrest taken out by the Republican Government of Spain under which they claimed to have possession of the steamship *Arantzazu Mendi* adjudged to them.

The facts are summarized in the headnote and are fully set out in the judgment of Slesser L.J.

G. St. C. Pilcher K.C., *Owen Bateson* and *J. G. Foster* for the appellants. There are two independent points: (A) whether the Nationalist Government of Spain is the government of a foreign sovereign state, and, (B), if so, is it impleaded by these proceedings?

(A) No other Government except the Republican Government is recognized by His Majesty's Government as the de jure government of Spain, i.e., of the whole state; and the mere fact that the Nationalist Government is recognized as having de facto administrative control over part of Spain, and is not subordinate to any other government in that area, is not sufficient to make that area a "state." There may be two or more governments, but there is only one state, and unless the Nationalist Government is a sovereign "state" it cannot claim immunity in our Courts. On the authority of *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor & Co.* (1) and *The Gagara* (2) it must be admitted that where a "state" has received some recognition of de facto sovereignty it is entitled to immunity, but recognition of a de facto government is not sufficient in itself, it must be recognition of a "state." "Recognition is the act through which it becomes apparent "that an old State is ready to deal with a new state as . . . . "a member of the Family of Nations . . . . [and] in every case "of civil war a foreign State can recognize the insurgents as "a belligerent Power. . . . . But between this recognition "as a belligerent Power and the recognition of these "insurgents and their part of the country as a new State, there "is a broad and deep gulf" (Oppenheim's International Law, 5th ed., vol. i., ss. 72 and 74). Up to the present time

(1) [1921] 3 K. B. 532. (2) [1919] P. 95.

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the Nationalist Government, a government at war, has not even been accorded belligerent rights (cf. *The Manilla* (1)). The decision in *Banco de Bilbao* v. *Sancha* (2), on which Bucknill J. largely relied, does not touch the present point, for there was no question of immunity from arrest in that case.

(B) On the second point it is submitted that the Nationalist Government is not impleaded by this writ ; it is not directed to them—although no doubt they could intervene as interested parties—and they were not, as the Republican Government was in *The Cristina* (*Compania Naviera Vascongado* v. *Steamship Cristina and Persons claiming an interest therein*) (3), in actual possession of the vessel. The mere ipse dixit of a Government that it claims ownership or possession is insufficient to oust the jurisdiction of our Courts : see Lord Maugham's speech in *The Cristina*. (3) The decision of Bucknill J. in the present case goes much further than *The Cristina*. (3)

[Slesser L.J. referred to *The Jupiter*. (4)]

The legal possession in this vessel at all material times was in the Admiralty marshal : *The Petrel* (5) ; *The Harmonie*. (6)

[Goddard L.J. The marshal is not holding in his own right, and his position is very different from that of a sheriff's officer.]

The res, however, was in the possession of a third party, it was not in the owners or the Nationalist Government. The principle of immunity applies, as the Master of the Rolls said in *Haile Selassie* v. *Cable and Wireless, Ld.* (7) : " Where "it is either admitted or proved that property to which a "claim is made either belongs to, or is in the possession of, "a foreign sovereign, or his agent," and, it is submitted, it does not apply if those facts are not proved : see also Scrutton L.J.'s observations in *Luther* v. *Sagor & Co.* (8)

[Slesser L.J. Are you not interfering with the owners' proprietary right to hold the ship, as they and the master state they are, at the disposal of the Nationalist Government ?]

(1) (1808) Edw. 1.
(2) [1938] 2 K. B. 176.
(3) [1938] A. C. 485.
(4) [1924] P. 236.
(5) (1836) 3 Hagg. Adm. 299.
(6) (1841) 1 W. Rob. 179.
(7) [1938] Ch. 839, 844.
(8) [1921] 3 K. B. 532, 555.

No one has interfered with their proprietary rights except possibly the marshal. Neither proprietary nor possessory rights are acquired by the requisition on behalf of the Nationalist Government (see *The Broadmayne* (1)), and further the assertion as to requisition is disputed, for the Republican Government undoubtedly requisitioned the vessel first.

[Reference was also made to *The Messicano* (2); *The Crimdon* (3); and *The Porto Alexandre.* (4)]

Sir Robert Aske K.C., J. V. Naisby and *R. Valls* for the respondents [called on to argue the second question (B), whether the writ and arrest impleaded the Nationalist Government].

The Nationalist Government need not be directly impleaded; they are impleaded by the arrest of property in which they have an adequate interest: see Lord Wright's speech in *The Cristina.* (5) Judgment in an action in rem is good against all the world, and, if this action goes on, the Nationalist Government must intervene and attend the Court or lose their rights. Both ownership, and, it is submitted, possession, is still in the owners, and they and the master have declared on oath that they hold the vessel at the disposal of the respondents under the requisition order.

[They were stopped.]

SLESSER L.J. This is an appeal from a decision of Bucknill J. arising out of a motion, which in itself is consequent upon a claim made by the plaintiffs, the Government of the Republic of Spain, to have possession of a steamship, the *Arantzazu Mendi*, adjudged to them.

According to the practice, in appropriate circumstances, the writ should be directed to persons interested in the ship. As the learned judge said, the writ in this action is not in proper form. According to Order XII., r. 24, however, any person not named in the writ may intervene and appear on filing an affidavit showing that he is interested in the res; and it is said here, that the defendants, the Nationalist Government of Spain, as they are called, have entered an appearance conditionally and are parties interested in the res, and the learned judge tells us that he has dealt with the case on the footing that they have entered an appearance as interveners and are parties interested in the res.

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(1) [1916] P. 64.
(2) (1916) 32 Times L. R. 519.
(3) (1918) 35 Times L. R. 81.
(4) [1920] P. 30.
(5) [1938] A. C. 485, 507.

The Nationalist Government of Spain, having so entered a conditional appearance, moved the Court for an order that the writ and all subsequent proceedings in the action, including the arrest of the ship, be set aside on the following grounds: (i.) "This action impleads a foreign sovereign "state, namely, the Nationalist Government of Spain. The "said Government is unwilling to submit to the jurisdiction of "this Honourable Court." (ii.) "The said steamship is in "the possession of the said Government by its duly "authorized agents." (iii.) "The said Government is, and "at all material times was, entitled to possession of the said "steamship." (iv.) "The dispute in this action is between "two sovereign states and the Court has no jurisdiction, or, "alternatively, will not exercise its jurisdiction, to decide "the same." (v.) "A claim to the said steamship is being "made by a foreign sovereign state and the Court has no "jurisdiction, or, alternatively, will not exercise its jurisdiction, "to decide the validity of the said claim."

The learned judge acceded to the argument raised by the Nationalist Government of Spain, and in the result he made an order, as they prayed; but said that the arrest of the ship was to be continued until this appeal was determined.

The first question which arises is whether the Nationalist Government of Spain is or is not a foreign sovereign state, because it is only if they establish that they are the government of a foreign sovereign state that the claim which they make on their motion can be founded at all. In that matter, the learned judge had occasion, according to the proper practice, to consult the appropriate Government authority, namely

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the Foreign Office, to ascertain what was the view of His Majesty with regard to this particular state, and for that purpose a question was addressed, by direction of the learned judge, to the Secretary of State for Foreign Affairs to ascertain the will of His Majesty. In certain of the cases which have been cited to us, and in the argument, the phrase has loosely been used that the Government, or the Foreign Office, or the Secretary of State for Foreign Affairs, recognizes or does not recognize what is alleged to be a foreign government; but it is of course clear that the recognition rests with His Majesty and His Majesty alone, though the fact of the recognition be communicated to the Court through the appropriate government department.

In this case the question was raised whether the Nationalist Government of Spain is recognized by His Majesty's Government as a foreign sovereign state. The more correct constitutional question would have been: Whether the Nationalist Government of Spain is recognized by His Majesty as a foreign sovereign state? However, that does not impeach the validity of the answer which was received by the Foreign Office and which is: " (i.) His Majesty's Government recognises Spain as a foreign sovereign state. (ii.) His Majesty's "Government recognises the Government of the Spanish "Republic now having its seat in Barcelona as the de jure "Government of Spain. (iii.) No Government other than that "referred to in the preceding sub-paragraph is recognised by "His Majesty's Government as the de jure Government of "Spain or any part thereof. (iv.) The Nationalist Government "of Spain is a Government in conflict with the Government of "the Spanish Republic established at Barcelona. It claims "to be the Government of Spain and is seeking to overthrow "the Government of the Spanish Republic and to establish "its authority over the whole of Spain. (v.) His Majesty's "Government recognises the Nationalist Government as a "Government which at present exercises de facto administrative "control over the larger portion of Spain. (vi.) His Majesty's "Government recognises that the Nationalist Government "now exercises effective administrative control over all the

"Basque Provinces of Spain. (vii.) His Majesty's Government "has not accorded any other recognition to the Nationalist "Government. (viii.) The Nationalist Government is not "a Government subordinate to any other Government in "Spain."

From these answers it is clear, first, that His Majesty recognizes the Republican Government of Spain as the de jure Government of the whole state. Yet it is equally clear that His Majesty recognizes that the Nationalist administration—if I may use a neutral word—is a government. Secondly, he recognizes that it is a government not subordinate to any other government in Spain; and, thirdly, he recognizes that it now exercises effective administrative control over all the Basque Provinces of Spain; an answer which is important in the present case, in that the ship which is here to be considered was registered in the port of Bilbao, which is within the Basque Provinces of Spain.

In my opinion, having regard to those answers, it is clear on the authorities that the answers require this Court to say that His Majesty has recognized the Nationalist Government of Spain as the Government of a foreign sovereign state. Whatever doubts might formerly have existed on this head were determined so far as this Court is concerned by *Luther* v. *Sagor & Co.* (1) There it was held that where a foreign government has been recognized de jure or de facto the Court will not inquire into the validity of its acts. It is true, as Mr. Pilcher said, that the actual question under consideration was different from the one in the present case; but there are passages in the judgment which make it quite clear to my mind that this Court, on the principles there laid down, would, on the answers here given and there given, have regarded a government de facto as a foreign sovereign state. Thus Bankes L.J. says: "Wheaton quoting from Mountague "Bernard states the distinction between a de jure and a de "facto government thus (2): 'A de jure government is one "'which, in the opinion of the person using the phrase, ought

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(1) [1921] 3 K. B. 532, 543, 551, 557.

(2) International Law, 5th English ed. (1916), p. 36 [6th ed. (1929) p. 43].

"'to possess the powers of sovereignty, though at the time "'it may be deprived of them. A de facto government is one "'which is really in possession of them, although the possession "'may be wrongful or precarious.'" Warrington L.J. adopts the same passage. And Scrutton L.J. says: "It may well be "a question when first the struggling body attained such power "that it was a government de facto, and over what area, and "that you cannot answer that question by knowing that some "years later the Sovereign recognized it as the government de "facto over a particular area. When that question is "to be answered, the Courts must ask the Sovereign for "information."

I do not understand Mr. Pilcher in general to dispute that a government held by His Majesty to be a government de facto should be regarded as a sovereign state for the purposes of international law which have to be considered here. His argument, as I understand it, is rather this: That Spain being treated both in the question and in the answer as one unit, and in the present case there being a statement from the competent authority that, de jure, Spain is one unit, there is no complementary statement that the whole of Spain as such is de facto in the possession of the Nationalist Government; and he is right in saying that no such point arises in *Luther* v. *Sagor & Co.* (1), because there it was conceded that the whole of Russia—the country there to be considered—was de facto in the effective administration of the Soviet Republic. But there has been a case in this Court, if authority be needed on this matter, *Banco de Bilbao* v. *Sancha* (2), where the Court had to consider the de facto government of Nationalist Spain, which at that time, as now, though the boundaries may have been different in extent, was yet a de facto administration over only a portion of the whole of Spain; and there, as I read their Lordships' judgments, albeit they are considering a different matter, they did in terms apply the principles of *Luther* v. *Sagor & Co.* (1) In *Banco de Bilbao* v. *Sancha* (2) Clauson L.J., stating the opinion of the whole Court, said: "So far at all events as this Court is concerned this

(1) [1921] 3 K. B. 532.
(2) [1938] 2 K. B. 176, 195.

"question"—namely, whether His Majesty's Government recognize the Spanish Republican Government with its seat in Valencia or Barcelona as the de jure Government of the whole of Spain, but at the same time recognize the insurgent Government of General Franco as the Government de facto of the area in which Bilbao is situate—" seems to be settled "by the principles laid down in decisions of this Court in "*Luther* v. *Sagor*." (1) Even if there was no authority to that effect, I should myself unhesitatingly take the view that once it is found as a fact that within certain boundaries, whatever they may be—and here we are told they at least include the whole of the Basque Provinces—there was a de facto government, the mere fact that there was another government, claiming to be the de jure government, in that area, in the unit which is called Spain, if it be a unit, would not deprive the Court of the duty of finding, on that statement, that that de facto Government—which points to some orderly and organized institution—is so organized in that area, although fluctuating, as to possess the powers of a state.

In those circumstances I think that it is a proper conclusion that the Spanish Nationalist Government has been recognized by His Majesty de facto, and must be regarded by the Court as a sovereign state.

It has been said by Mr. Pilcher, who has argued this case with great vigour and lucidity, that there may be some relation between the according of belligerent rights and the recognition of a sovereign state. I am unable to see the necessary connection between the two matters. It is quite true, as Oppenheim says—and no doubt other authorities are to the same effect—that the mere fact that insurgents are recognized as a belligerent power will not necessarily of itself compel the Court to recognize those insurgents as a sovereign foreign state. As he says: " Between this recognition as a belligerent "Power and the recognition of these insurgents and their "part of the country as a new State, there is a broad and deep "gulf."

But in this case whether there is such a gulf or not is beside

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(1) [1921] 3 K. B. 532.

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the point. We have had no official information whether or not belligerent rights have been accorded to General Franco's Government. I will assume for the purpose of this case, though I am doubtful about it, that we can take judicial notice of the fact that belligerent rights have not been accorded. That is not a question we are here to consider. It may be that the mere fact of according belligerent rights does not constitute a government exercising sovereign rights a state. Here we are informed, without any reference to belligerent rights, that His Majesty does recognize the Government—again I call attention to the word "government"—of Nationalist Spain as an independent body exercising effective administrative control within its own area.

In those circumstances Mr. Pilcher is driven to his second argument, which, I will admit, has afforded me considerably more difficulty than his first one. Assuming that the Nationalist Government are the government of a sovereign state, has it been shown here that this action is calculated so to implead them that they can object to the jurisdiction of the Court? On that matter it is necessary to enter to some extent into the history of this case.

The *Arantzazu Mendi* was a ship the property of a private company registered at Bilbao, and on June 28, 1937, she, then not being in Spanish waters, was requisitioned by the Republican Government, and the effect of that requisition was normally to require that the owners should, so far as the control and destination and disposition of the affairs of the ship are concerned—I am speaking generally—hold the ship under the disposition of that Government. It was not a confiscation of the ship, but it was a decree of requisition. On August 24, 1937, the ship having arrived within English territorial waters, the owners issued a writ for possession, and the ship was accordingly arrested in London. That action, in which a conditional appearance was entered by the Government of the Republic of Spain and by their agents, the shipping company, was adjourned, and the proceedings were stayed while another action was being heard in the Chancery Division, in which various claims of persons exercising or claiming proprietary rights in the company were being considered. That Chancery action was settled in March, 1938—the terms of the settlement do not concern us here—and on April 12, accordingly, the action in rem for possession was discontinued. Now before the ship was released from arrest the Republican Government issued their writ in the present action. It appears that one reason why the ship was not released from arrest was that certain moneys were owing to the marshal in connection with the custody of the ship. On March 2, 1938, the Nationalist Government had issued decrees, one in general terms requisitioning various ships, and a specific decree affecting this particular ship. The second article of that decree says : " The Government, by means of the appropriate "decrees and in fulfilment of the function which is defined in "the first article,"—which includes all vessels of any class and nature engaged in maritime navigation and fishing and are entered on the register of vessels of Spanish ports, and the like—" will assume and put into practice such possessory "and managerial powers as may be expedient for the proper "employment and service of the vessels requisitioned and for "the attainment of the purposes for which they were intended ; "all this without prejudice to rights of ownership and to fair "and legal compensation to the lawful owners or managers, "who will recover the whole of their powers and the full "exercise of the rights which pertain to them so soon as the "extraordinary circumstances which give rise to the limitation "thereof shall disappear." I think on that Mr. Pilcher was right when he said that the requisition of the Nationalist Government on March 2 did not purport to be a complete extinction of the ownership of the owners of the ship, but only gave such necessary and managerial powers in the proper employment of the ship being requisitioned as stated in the second article.

In those circumstances, on March 23 the decree of the Nationalist Government was formally applied to the steamship in this case ; and on April 5, the ship then being in the custody of the marshal, the Nationalist Government served notice upon the master of the ship of their requisition. It appears, therefore, that both Governments have sought to utilize their powers to obtain control of the ship. I would add that by an affidavit dated May 6, 1938, the captain of the ship says: "On April 5, 1938, I was serving on the steamship *Arantzazu* "*Mendi* as her master in the service of the Compania Naviera "Sota y Aznar, the owners of the said steamship. On the "said date I was served by the sub-agent of the Nationalist "Government of Spain with a notice of requisition by the "said Government of the said steamship *Arantzazu Mendi* and "I undertook to hold the possession of the said vessel for "and on behalf of the said Nationalist Government of Spain. "Since the said date I have continued on board the said vessel "and have held and still hold the same solely on behalf of "and at the order and disposition of the said Nationalist "Government, and have not recognized and do not recognize "any other authority than the said Government. At no time "since April 5, 1938, have I received any instructions or "communications from the plaintiffs in this action or their "representative, neither do I recognize nor acknowledge their "right to give me any instructions."

To that must be added another statement, which is in the form of an affidavit by an agent of the Nationalist Government, Luis Martinez de Irujo. It is a translation. It is an exhibit from the Spanish of a Protocol Book of Public Instruments kept at the Sub-Agency, and contains this matter. After reciting that he is the sub-agent in charge of the Consulate General, he says that the managing director of the company which owned the ship, the Naviera Sota y Aznar, declares as follows. Then follows the declaration of the managing director: That on April 5, 1938, he received a notification from His Excellency The Duke of Alba, Agent of the Spanish State in Great Britain, to the effect that, in pursuance of the decree-law dated March 2, 1938, and the decree of the same date, both published in the Official Bulletin, certain vessels owned by his company, including the *Arantzazu Mendi*, were requisitioned. Then follows the decree, to which I have already referred. " He declares that he freely "submits to what is provided in the said decrees and, in the

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"name of the Compania Naviera Sota y Aznar, gives his "consent to the said vessels being requisitioned at the free "disposal of the National Government of Spain to the intent "that it may make use of such vessels in the manner laid down "in the said decrees." Now, as I have already pointed out, in the decree the Nationalist Government of Spain had stated that, subject to the rights of control and disposition which I have mentioned, ownership should remain in the owners, and that they might seek compensation.

On that it is said by Mr. Pilcher that it is not right to take the view that the Nationalist Government are impleaded. He points out, first of all, that at all material times they are unable to say that they are in possession of this ship; that at all material times the marshal of the Admiralty Department of the High Court was actually in possession of her; and that therefore it is wrong to say that at any time they can claim any right as being in possession.

Having considered the necessary rules and the authorities which have discussed the position of the marshal, it appears to me that it is right to say that the legal possession of the ship during this period was in the marshal. It is not necessary, for this purpose, to cite many authorities, but I will mention *The Petrel* (1), where Sir John Nicholl, speaking of the case of a ship which was arrested by the marshal, speaks of it as "This vessel, while in the legal possession of this Court." I am prepared, at any rate, to assume for the purposes of this case that at all material times it is right to say that the Nationalist Government were never able to say that they were in possession of this ship.

But, having come to that conclusion, I do not think that that by any means disposes of the matters which we have here to consider. The Republican Government of Spain by their writ claim without qualification to be entitled to have possession of the ship adjudged to them, and that, as has been pointed out in an action in rem, if they succeeded, would necessarily have the effect of destroying any other interests

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(1) 3 Hagg. Adm. 299, 301.

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which might properly be claimed by any other adverse party in this ship.

Now, the evidence before the Court is to this effect: that both the master and the owners agree that so much interest in this ship as is included in the powers of requisition, has by them been accorded to the Nationalist Government. Those are, I agree, not powers of ownership but powers of the disposition and control of the ship. For this purpose, it seems to me not material to inquire whether that requisition was or was not of legal effect in Spain. It is enough to say that the powers mentioned in that requisition, namely, the powers short of ownership, of disposition and control, are conceded by the owners and the master now to be held by them as agents for the Nationalist Government. The question then arises on that, whether, in order to resist the claim of the Republican Government—which, if it succeeded, would exclude even these powers—it is necessary for the Nationalist Government to intervene, to appear as defendants and be impleaded; that is to say, to sacrifice their independence in order to maintain their proprietary interest in these rights.

The matter is not free from authority, and, in particular, I would refer to the speech of Lord Wright in *The Cristina* (1), where he says this: "The appellants, while not contesting "the general principle, have denied that it applies to the facts "of the present case, for various reasons. In the first place "they have relied on the fact that the Spanish Government "had no property (in the sense of ownership) in the *Cristina*," —there, as here, the Spanish Republican Government had claimed by requisition to control and deal with the ship— "whereas in *The Parlement Belge* (2) the Belgian Government "was the owner of the mail packet. But the rule is not "limited to ownership. It applies to cases where what the "Government has is a lesser interest which may be not merely "not proprietary but not even possessory. Thus it has been "applied to vessels requisitioned by a Government, where in "consequence of the requisition, the vessel, whether or not "it is in the possession of the foreign State, is subject to its

(1) [1938] A. C. 485, 507.

(2) (1880) 5 P. D. 197.

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"direction and employed under its orders. That was a "separate ground in *The Porto Alexandre* (1), apart from the "question whether, or fact that, the vessel had actually "become the property of the Portuguese Government, which "was possessing and employing her." The learned Lord also quotes to the like effect *The Broadmayne*. (2) I can find in the speeches of the learned Lords in the House of Lords in *The Cristina* (3) no statement which throws any doubt on that proposition.

True it is that both in that case and the case heard in this Court, *Haile Selassie* v. *Cable and Wireless, Ld.* (4), there are observations that a mere claim of itself will not necessarily justify the intervention, either on the record or before the Court, of a sovereign any more than of any other person. But here we have, on the face of it, the claim made by the master and by the owners that they do hold these limited interests arising from the requisition, for the Nationalist Government in Spain.

I therefore am of opinion, first, that the Nationalist Government have not shown that they are in possession of this ship; secondly, that they have failed to show that they have any ownership in this ship. Nevertheless, I think, following Lord Wright, that they have shown that they have a lesser interest imposed by the requisition, which interest, on the uncontradicted evidence, is held for their benefit by the master and the owners, who have both said that they would act according to the desires of the Nationalist Government as expressed in the requisition; and that they have shown a sufficient interest for the Nationalist Government to be compelled, unless they wish to see that interest destroyed, to come before the Court and defend that interest. They are therefore put to the election of sacrificing, as it has been said, either their independence or their property, for this interest is a proprietary interest, albeit it does not go to the fullest extent of ownership.

For these reasons I think that they may say they are

(1) [1920] P. 30.
(2) [1916] P. 64.
(3) [1938] A. C. 485.
(4) [1938] Ch. 545.

impleaded in this action; that their rights in these interests are at stake; and being the Government of a sovereign state they can rely upon the general principle which has been laid down for so many years in *The Parlement Belge* (1) and *The Jupiter* (2); and I think that the learned judge was right in his decision, in which he acceded to the motion and made an order accordingly.

In my opinion this appeal fails and must be dismissed with costs.

FINLAY L.J. I am of the same opinion, and I desire only to add a very few words because, for myself, I am perfectly content with the manner in which the case has been put by my Lord and, I may add, with the way it was put by Bucknill J. in the Court below.

On the first point I do not want to add anything at all. On the second point, namely whether the Nationalist Government is here impleaded, I do just desire to add this. The law is, I think, clearly set out in two passages in *The Cristina* (3): one is the passage in the speech of Lord Wright, which has just been read by my Lord and which I do not need to read again; the other is a passage in the speech of Lord Atkin, which I think is important, where he says this: "In these days it is unusual to name defendants: when the "defendants are described as 'the owners of a vessel' they "can be at once identified. When persons are not entitled "the defendants but in the body of the writ are cited to "appear as persons claiming an interest, there is said to be "some uncertainty whether they appear under leave to "intervene or without such leave. In any case when they "do appear they appear as defendants, and as such I conceive "that they are impleaded. And, when they cannot be "heard to protect their interest unless they appear as "defendants, I incline to hold that, if they are persons "claiming an interest, they are by the very terms of the "writ impleaded." Now, here it appears to me, for the reasons which have just been given by my Lord, quite clear that there was an interest in the Spanish Nationalist Government. The owners and the officer had agreed to hold the ship on the terms that it should be subject to requisition by the Nationalist Government. What the rights of a government to requisition a ship are has been defined in a good many cases, for example *The Broadmayne* (1), and I find it impossible to see how it can be said here that the Spanish Nationalist Government have not and cannot have an interest in the matter now being decided. A claim has been put forward, and they will therefore inevitably lose rights which they claim if judgment is given in accordance with the prayer of the writ.

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(1) 5 P. D. 197.

(2) [1924] P. 236.

(3) [1938] A. C. 485, 492.

The ground, as I understood it, on which Mr. Pilcher rested this part of his case appeared to me throughout to be a technicality, though, of course, a technicality which had to be dealt with. He said: " But the marshal here is in possession." Assuming that the sole possession is in the marshal—which is a matter which might require some further discussion—but assuming that, I do not think that it carries Mr. Pilcher's point, and for this reason: the rights to be considered are not rights of possession, they are proprietary rights, as was pointed out by Lord Wright in the passage just read by my Lord. And, assuming that the true view is that possession is so exclusively in the marshal that there can be no other possession than his, I find it quite impossible to see why, taking that view, it should be said that a right—a very important right—is not here being claimed by the Nationalist Government; nor why, if the ship was adjudged as claimed in the writ, the Nationalist Government would not be deprived of that right.

For these reasons, purely supplementary to those given by Bucknill J. below, and by my Lord, I agree.

GODDARD L.J. I am of the same opinion. I think the strength of Mr. Pilcher's argument on the first point was as to the true construction, if I may so put it, of the letter which the Secretary of State wrote in answer to the questions propounded by Bucknill J. I have always understood, and I believe it to be the law, that where a question is raised as to the status of a body of persons who claim to be a government of a sovereign state where a question is raised as to whether there is sovereignty in that body or not, it is not for the Court to decide it. The Court cannot take evidence on that point, and it is not for the Court to express a finding on it. The proper course, and the only course, is to inquire of the Secretary of State what His Majesty's attitude is pleased to be; and it seems to me that it is most desirable in these cases, that where a Court propounds a question of this sort to the Secretary of State, a clear answer should be given, if it be possible to give one. If, of course, His Majesty is not pleased to come to any determination on the facts, then the Court should be so informed.

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(1) [1916] P. 64.

In this case the question propounded by Bucknill J. was whether the Nationalist Government of Spain is recognized by His Majesty's Government as a foreign sovereign state, and the answer was given in nine paragraphs. The facts which are set out by the Secretary of State seem to me to amount beyond any question of doubt to this, that the Nationalist Government of Spain is a de facto sovereign state, and I say that particularly for this reason: that the fifth paragraph of the answer is " His Majesty's Government "recognises the Nationalist Government as a Government "which at present exercises de facto administrative control "over the larger portion of Spain." The sixth paragraph of the answer is " His Majesty's Government recognises that the "Nationalist Government now exercises effective administra"tive control over all the Basque Provinces of Spain." I do not know whether that is in any way meant to be different from de facto administrative control, but I should think it is the same thing. The seventh paragraph is: " His Majesty's "Government has not accorded any other recognition to "the Nationalist Government." Now, more particularly, para. 8: " The Nationalist Government is not a Government "subordinate to any other Government in Spain." I take it, ex hypothesi, that it was not subordinate to any other Government. In *The Parlement Belge* (1) the test of sovereignty for the purpose of immunity was laid down by Lord Esher. Therefore, if His Majesty's Government informs the Court that the Nationalist Government had absolute independence of any superior authority, it informs the Court that the Government is de facto the sovereign state over that part of Spain.

Nor do I think I can accede to Mr. Pilcher's contention that because the Secretary of State informs the Court that His Majesty's Government recognizes Spain as a foreign sovereign state, that necessarily excludes the Nationalist Government as a sovereign state because it does not exercise jurisdiction over the whole of Spain. It is just because one gets these competing governments that the question of de facto and de jure governments arises, and if there can be a de facto and a de jure government over the whole of the country, I cannot see why there cannot be both governments over part of the country. It seems to me, therefore, that we are informed by the Secretary of State with sufficient clearness, though I could wish with a little more directness, that there is a de facto Government in the Nationalist Government of Spain, and, accordingly, we are bound by authority to hold that for all purposes the consequences are the same as they would be if the government were a de jure government.

On the second point I also agree with my Lords. The speeches of the noble and learned Lords who decided *The Cristina* (2) and the recent case in this Court, *Haile Selassie* v. *Cable and Wireless, Ld.* (3), I think show this: that where a claim for immunity is made by a foreign sovereign, it is not enough that his claim should be "a bare assertion of right," as Lord Wright called it, or "a mere claim," as Lord Maugham called it. But if the Court can see that the question that arises is a question of competing rights, as in this case here, where we have got the fact that the owners of the ship admittedly have purported to give to the foreign

(1) 5 P. D. 197.
(2) [1938] A. C. 485.
(3) [1938] Ch. 839.

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sovereign who is claiming immunity rights over the ship—it may be that those rights are good or it may be they are bad, that is just what we cannot try—but if they purport to give rights over their ship and therefore there is more than a mere claim, and there is evidence before the Court on which it can be shown that the question which is to be decided in the case is competing rights, then it appears to me the principle of immunity applies, and that this Court has no option but to say that the decision of Bucknill J. is right and that the appeal must be dismissed with costs.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors for the appellants: *Petch & Co.*
Solicitors for the respondents: *H. A. Crowe & Co.*

E. C. M. T.

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1938
Oct. 24.

Shipping—Collision—Counterclaim—Limitation of Action—Counterclaim not brought within two years—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 34—*Maritime Conventions Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 8.

By s. 34 of the Admiralty Court Act, 1861: "The High Court "of Admiralty may, on the application of the defendant in any "cause of damage, and on his instituting a cross cause for the "damage sustained by him in respect of the same collision, direct "that the principal cause and the cross cause be heard at the "same time and upon the same evidence; and if in the principal "cause the ship of the defendant has been arrested or security "given by him to answer judgment, and in the cross cause the "ship of the plaintiff cannot be arrested, and security has not "been given to answer judgment therein, the Court may, if it "think fit, suspend the proceedings in the principal cause, until "security has been given to answer judgment in the cross cause."

By s. 8 of the Maritime Conventions Act, 1911: "No action "shall be maintainable to enforce any claim or lien against a "vessel or her owners in respect of any damage or loss to another "vessel . . . . caused by the fault of the former vessel . . . . "unless proceedings therein are commenced within two years "from the date when the damage or loss . . . . was caused."

"Provided that any court having jurisdiction to deal with an "action to which this section relates may . . . . extend any such "period, to such extent and on such conditions as it thinks fit " . . . ."

On September 4, 1936, a collision occurred in German waters between the plaintiff's yacht and a tug belonging to the defendants. The yacht became a constructive total loss and was broken up. Negotiations between the parties took place in Germany, but no proceedings were taken on either side until August 23, 1938, when, on her arrival in English waters, the tug was arrested in an action in rem. On August 31 the defendants entered an appearance, and, the two years within which to commence proceedings under s. 8 of the Maritime Conventions Act having expired on September 4, 1938, the defendants, who wished to counterclaim, moved the Court for leave.

They argued that by reason of s. 34 of the Admiralty Court Act, s. 8 did not apply to a defendant who wished to counterclaim, or that, if it did, the defendants had put themselves in order by entering an appearance within two years. In the alternative they asked the Court to exercise its discretion under the proviso to s. 8:—

Held, (*a*) that s. 34 was subject to the condition that a cross-action had been instituted, and (*b*) that the section was subject to the general law with regard to limitation of action and that

s. 8 of the Maritime Conventions Act applied: but (c), that under the circumstances it would be a manifest injustice to allow the plaintiff to proceed as if there were no counterclaim, when, on the same evidence and with no material increase of expense, the claim and counterclaim could be tried together: that the motion accordingly succeeded and that the plaintiff's action would be stayed until he gave bail to answer the counterclaim.

THIS was a motion by the defendants, the owners of the tug *Fairplay XIV.*, for leave to put forward a counterclaim in an action in rem brought by the owner of the auxiliary yacht *Snowbird* in respect of the loss of the yacht after collision with the tug or her tow in the mouth of the Elbe on September 4, 1936. The defendants also asked for the claim to be stayed until the plaintiff gave security to answer the counterclaim. The facts are sufficiently summarized in the headnote and are fully set out in the judgment.

Gordon Willmer for the defendants. Having regard to the provisions of s. 34 of the Admiralty Court Act, 1861, the defendants do not need to invoke the discretion of the Court under the proviso to s. 8 of the Maritime Conventions Act, 1911; that Act does not refer to s. 34 of the Admiralty Court Act, which clearly is intended to establish reciprocity between the parties. In any event, however, by appearing within the two years the defendants have put themselves in order and can invoke the provisions of s. 34.

If, however, contrary to their submission, it be necessary to ask for an extension of time under the proviso to s. 8, the defendants have a very strong case. The plaintiff did not bring his action and file his claim in time for the defendants to deliver a counterclaim. The defendants were content to let the matter rest unless and until they were attacked. All the witnesses necessary on the counterclaim will be necessary to defend the claim, and the claim and counterclaim can be tried together at little, if any, extra expense.

Owen Bateson for the plaintiff [called on, on the question of discretion only]. The defendants are clearly out of time; entering an appearance or indeed notice of a counterclaim in correspondence is not "setting up" a counterclaim:

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The Saxicava. (1) There was nothing to prevent the defendants, had they been so minded, bringing an action at any time within the two years, and they could have issued a cross-writ after the plaintiff issued his writ; they had eleven days in which to do so. The plaintiff now has the statutory right which s. 8 of the Maritime Conventions Act, 1911, affords, and should not be deprived of it without very good cause (see *The Kashmir* (2)), and the defendants' application is without merits.

THE PRESIDENT (SIR BOYD MERRIMAN). This is a motion by the defendants, who have appeared in the action in rem between the owners of the motor yacht *Snowbird* and the owners of the tug *Fairplay XIV.*, to be allowed to prosecute a counterclaim notwithstanding the provision of s. 8 of the Maritime Conventions Act, 1911. The circumstances are that on September 4, 1936, there was a collision in German waters between the *Snowbird* and this tug, or her tow. The precise circumstances of the collision have not been gone into on this motion and will form a subject of investigation in the action. But I am told that after the collision there was a certain amount of negotiation in Germany in the course of which the owner of the *Snowbird* put forward his claim. There were discussions as to limitation, and so forth, but it is not very clear, on what I have been told, to what extent, if any, the tug-owners put forward any detailed counterclaim. Whatever the position was at the time, however, nothing further was done in the sense that no proceedings were taken by either side in the German Courts, and, apparently, the matter had gone to sleep. But on some date in July, 1937, the owner of the *Snowbird* did give instructions to his London solicitors that a look-out was to be kept for the tug in case she came into English waters, and that, if she did so, an action in rem was to be started. Faithful to their instructions, the solicitors had a very vigilant look-out kept, and on her arrival in these waters on August 23, 1938, they got information through Lloyd's signal station, and, practically on her arrival in an English port, a writ was issued and her arrest effected.

(1) [1924] P. 131. (2) [1923] P. 85.

Meanwhile the *Snowbird* herself, which had been sunk by the collision, had been salved in circumstances which made her a constructive total loss, and I am told that she was broken up some time ago. As far as the defendants were concerned, therefore, there was at no material time a res against which they could take action. Whether it was that they did not wish to sue in Germany, or that they preferred to "let sleeping dogs lie" unless and until they were attacked, they have not, in fact, taken any action against the plaintiff. But now that their ship has come to this country, and been arrested in an action which has been constituted in this Court, they wish to be allowed to proceed by way of counterclaim. The arrest having taken place on August 23, it is plain that they had eleven days from the time when they were attacked in which they would have been in time to take any proceedings that they might be advised to take. Mr. Willmer does not, of course, dispute that they could have put themselves in order by issuing a cross-writ at any time between August 23 and September 4, and if they had done so no question would have arisen, and this motion would have been unnecessary. Instead of which, all that they actually did was to enter an appearance in the action against them, and that they did on August 31, five days before the period of two years had elapsed.

Mr. Willmer takes two points. He says, first, that s. 8 of the Maritime Conventions Act, 1911, does not apply to a defendant who wishes to counterclaim, by virtue of the terms of s. 34 of the Admiralty Court Act, 1861. He also says that if it does apply, he puts himself in order by appearing within the two years. I find it impossible to accept either of those two contentions. Sect. 34 of the Admiralty Court Act provides that "The High Court of "Admiralty may, on the application of the defendant in any "cause of damage, and on his instituting a cross cause for the "damage sustained by him in respect of the same collision, "direct that the principal cause and the cross cause be heard "at the same time and upon the same evidence." In other words it is a condition of the section operating that the defendant shall institute a cross cause for the damage sustained by him. That part of the section so far applies whether the action is in rem or in personam, and then it goes on "and "if in the principal cause the ship of the defendant has been "arrested or security given by him to answer judgment, and "in the cross cause the ship of the plaintiff cannot be arrested, "and security has not been given to answer judgment therein, "the Court may, if it think fit, suspend the proceedings in the "principal cause, until security has been given to answer "judgment in the cross cause."

That is this case. The defendants' ship has been arrested and the plaintiff's ship cannot be arrested, but it is still, in my opinion, subject to the condition precedent in the first paragraph of the section that the defendant has instituted a cross cause of action for damage. That section, in my opinion, is subject to the general law with regard to the limitation of actions which applies, undoubtedly, to an Admiralty action in personam. It merely gives the Court certain special power to safeguard the defendant in a proper case, and I have no doubt whatever that s. 8 of the Maritime Conventions Act, 1911, applies to this case notwithstanding the wording of s. 34 of the Admiralty Court Act, 1861.

In other words, these defendants, as soon as they were attacked, ought to have done one of two things. They ought to have issued a cross-writ before September 4, which would have put them in time, or, if time had permitted, have put in a counterclaim. Now in fact, in the ordinary course of procedure they could not counterclaim by September 4 because the plaintiff's statement of claim had not been delivered. It would have needed some special order to accelerate the pleadings to enable them to proceed in time. I have no doubt that, if any such application had been made, the answer would have been: "Why do you not take out a cross-writ "and then the matter can be dealt with on the cross-writ." But in neither sense had they in fact instituted proceedings on their claim before September 4.

That being so, it seems to me as plain as can be that the defendants had to come to this Court under the proviso

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to s. 8 and ask for an extension of time, notwithstanding Mr. Willmer's point that within the two years they have entered an appearance. They were content not to prosecute their claim until the offensive was taken against them, I think. The offensive was not taken until eleven days before the two years had expired. Unless the plaintiff could arrest the ship he, in fact, would have been barred by the section as far as his own action is concerned. But s. 34 is obviously intended to effect some sort of reciprocity between claims and counterclaims in respect of a collision, and having regard to the fact that both parties were discussing the situation with reference to possible claims in the German Courts soon after the collision, there really is no hardship to the plaintiff, who did not pursue his claim in Germany, in being confronted with the counterclaim to his claim, now that he intends to pursue it in England. When the matter comes to be tried all the witnesses will be relevant on both claim and counterclaim.

In these circumstances it seems to me that Mr. Willmer makes out a very strong prima facie case for an extension of time, and, in substance, Mr. Bateson's answer to it is simply this : "I have obtained a statutory right to protection ; why, therefore, should that statutory right be interfered with ? " If Mr. Willmer were seeking to attack Mr. Bateson's clients without their having provoked him to do it, I should have thought that that was a very strong argument. But it seems to me to be rather ridiculous that having brought his claim here within the two years' time limit—as it happens, eleven days within the two years' time limit—the plaintiff should be able to stand upon a statutory right to protect himself from a counterclaim which, in substance, may be an answer to the claim which he, himself, is putting forward.

I think that in the circumstances of this case—and I am only dealing with this case—a greater hardship would be caused by debarring the defendants from putting forward their counterclaim than can possibly be caused to the plaintiff by allowing the counterclaim to proceed. I put it on higher ground than that. It seems to me, to put it quite plainly, that it would be a manifest injustice if the plaintiff were allowed

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to proceed as if there were no counterclaim, when, on the same material, and without any increase of expense that is worth considering, the matter can be tried out with both sides' cases before the Court, and that, whatever is the result, it will be arrived at fairly and equitably between the two. I think that the interests of justice demand that this counterclaim should be allowed to go forward.

The defendants, who could have put themselves right by issuing a writ within the two years, must pay the costs of the motion.

After discussion as to security, THE PRESIDENT said that the plaintiff must furnish security in the sum of 1500*l.* or, on notice by the plaintiff within seven days, in such other sum as the registrar might decide.

Solicitors for the plaintiff: *Bennison, Garrett & Co.*

Solicitors for the defendants: *Bentleys, Stokes & Lowless.*

E. C. M. T.

1938
Oct. 10, 11,
15, 21.

[IN THE ARCHES COURT OF CANTERBURY.]

ON APPEAL FROM THE CONSISTORY COURT OF TRURO.

ROFFE-SILVESTER *v.* KING.

Ecclesiastical law—Holy table—Stone altars—Removal—Consistory court—Discretion of chancellor—Aumbries—Sanctuary lights.

The holy table in a church is in a category by itself and is not in the categories of ornaments or decorations. It must be movable and made of wood. If made of stone, it is illegal, and no confirmatory faculty can be issued for its retention.

Faulkner v. *Litchfield* (1845) 1 Rob. Eccl. 184, and *Liddell* v. *Beal* (1857) Moore's Special Report, followed.

But once a church is equipped with a holy table, any subsidiary altar must be treated as a decoration, subject to the same tests as are applicable to decorations as such, and the consistory court has a discretion in deciding whether or not a faculty for its removal or a faculty for its retention should or should not issue. In exercising that discretion the chancellor is also entitled to take into consideration (inter alia) the number of subsidiary altars in the church, the fact that it was introduced without a faculty, practical matters, such as whether it tends to darken the church, and æsthetic considerations, as whether its retention tends to beautify the church or otherwise, also the fact that an altar is a memorial to a dead person, and the spiritual good of the parish as a whole.

An order of the chancellor for the removal of two aumbries affirmed; also for the removal of two sanctuary lights as being closely connected with the aumbries.

Appeal from an order of Sir William Graham-Harrison, chancellor of the consistory court of Truro.

The following is the statement of facts in the written judgment of the deputy-Dean of the Arches, Mr. W. N. Stable K.C. :—

This is an appeal from an order of the consistory court of the diocese of Truro dated August 30, 1938. A number of the matters in dispute had been the subject-matter of proceedings in the same consistory court, in the years 1931 and 1932, at which time Sir Philip Baker Wilbraham, the present Official Principal of the Arches Court of Canterbury, commonly called the Dean of the Arches, was chancellor of the diocese.

It was felt that there might be difficulties if this appeal were heard by the Dean of the Arches, being the same person as the judge of first instance in the earlier proceedings, and to meet this possibility, on September 28, 1938, by an instrument under the seal of the Official Principal of the Arches Court of Canterbury with the approval of His Grace the Lord Archbishop of Canterbury, I was nominated and appointed to act as lawful deputy or substitute for the purpose of hearing and determining this appeal. It is a matter of regret to me, as it must be to every one concerned, that the unfortunate accident to which I have referred has precluded the Dean of the Arches from entertaining this cause. Mr. Vaisey has told me that some years back, when an appeal came to this Court presided over by a deputy, a considerable time was devoted to a discussion whether the deputy could hear the appeal and whether in the absence of the Official Principal the Court was properly constituted. In the present case I am happy to say that all parties have concurred in the appointment of a deputy, and it is common ground that this Court is regularly constituted to hear and determine this appeal.

Before coming to the matters in issue, it is necessary to go back a number of years and to set out certain facts which, though not directly relevant, will help, I hope, to make what follows intelligible.

The present litigation, which was initiated by a petition presented to the consistory court of the diocese of Truro in the exercise of what is known as its faculty jurisdiction, is concerned with a number of articles now in the church of St. Hilary. To avoid misunderstanding throughout this judgment, I shall use the word "ornament" strictly in its technical sense, as meaning all the several articles used in the performance of the services and rites of the Church. Articles, as for example images, pictures and stained-glass windows, which are not ornaments in the strict sense, I shall call decorations. I shall use the word "article" in a comprehensive sense, including anything that may fall into either of the above categories.

St. Hilary's is the parish church of a parish in Cornwall with a population of some seven hundred souls. The parish is an ancient parish and the church in existence up to the year 1853 was built apparently in the fifteenth century. In 1853 this old church was burnt down, and immediately afterwards the present building was erected on the site of the old church. I am told, though the fact is not really material, that the church built in 1853 was a new church and not a restoration of the old building. The living was at all material times in the gift of the Dean and Chapter of Truro Cathedral.

In the year 1912 the Reverend Nicolo Bernard Walke was appointed to the living of St. Hilary and he was the incumbent until the year 1936, when he retired in consequence of failing health. Mr. Walke, as a result of ill-health, was in or about the year 1933 prevented from discharging the duties of his cure, but the omission was supplied by other clergymen from a number of other parishes the names of which are recorded on a tablet to which I shall have occasion to refer later. Mr. Walke is not a party to these proceedings, but it is common ground that the articles, the subject-matter of this litigation, with the exception of the old font which was utilized by Mr. Walke as a stoup containing holy water, were all introduced into the church during his incumbency and either by him or with his knowledge and approval, and that in no case were the provisions of the law which exist for the purpose of safeguarding our parish churches and the rights of the parishioners and others and of posterity, and which necessitate a proper application to the appropriate consistory court for a faculty before articles can be brought to or other structural alterations made in a church, observed. In fact, throughout the whole of Mr. Walke's incumbency, the existence of the consistory court was ignored, and, as will hereinafter appear, its jurisdiction was defied. Mr. Walke himself did not admit that he was under any obligation to the consistory court, and I am told that in the course of the earlier proceedings a letter from him to this effect was published in the Press. I have not seen this letter.

The present petition was presented to the court on August 28, 1937, by Miss Anna Maria King, a parishioner of the parish of St. Hilary, who has lived in the parish for nearly forty years. On November 4, 1937, an appearance was entered on behalf of the Reverend Charles Geoffrey Roffe-Silvester, then and now vicar of the parish, and Henry Reginald Hope, a parishioner and one of the churchwardens. Although Miss King was the sole petitioner, it is clear from certain resolutions of the parochial church council that she had the support of a majority of the council. I do not know when a parochial church council first came into existence in this parish. In the judgment which was given on March 9, 1932, in the earlier proceedings, it appears that there was no parochial church council of the parish in existence at that time. The petitioner in the present proceedings prayed that the chancellor would decree a faculty authorizing the vicar and churchwardens of the parish to remove out of the parish church of St. Hilary the articles specified in a schedule attached to the petition. These articles were twenty-three in number. The respondents to the petition by whom an appearance was entered duly filed their statement of objections and prayed that Miss King's petition be dismissed and asked for a confirmatory faculty for each of the twenty-three articles with the exception of two numbered respectively 18 and 22 in the schedule, and consisting of six silvered glass globes which have been described as " witch watching balls " hanging between the arches in the chancel, and a wood model of a house, hanging on the east wall of the north chancel aisle with an inscription on it. Whether the so-called " witch watching balls " had any significance or existed for any purpose other than that of illuminating the church by reflecting the lights of the lamps or candles, I do not know, nor indeed does it matter, as the chancellor has authorized the removal of both these items from the church, and as to them there is no appeal.

To revert to the history of the parish, it appears from the judgment of the consistory court in the earlier proceedings that during his incumbency Mr. Walke habitually held services in the church which bore little or no resemblance to the services to be found in the Book of Common Prayer. In fact it seems doubtful whether Mr. Walke held any services in the church out of the Book of Common Prayer or which bore any real resemblance to those services. I am not here to decide questions of ritual, much less the practices of Mr. Walke, who is not a party to these proceedings; but these facts cannot be ignored, as they provide a part of the explanation of conduct on the part of the petitioner on which Mr. Vaisey at one time in the course of his argument laid some stress as disentitling her from invoking the jurisdiction of the consistory court. It is sufficient for this purpose if I quote one short passage from Sir Philip Baker Wilbraham's judgment in the earlier proceedings. He said: " It is clear "that many at any rate of the services held at St. Hilary's go "far beyond what is permissible in the Church of England."

As I have already stated, until some date subsequent to the year 1932, there was no parochial church council in existence in this parish; but on May 26, 1931, a number of parishioners, of whom Miss King, the present petitioner, was one, presented a petition to the consistory court asking in substance for the removal from the parish church of sixteen different articles, all of which had been introduced without a faculty, that is to say, in an illegal manner. These articles comprised five stone altars, a tabernacle, two crucifixes, a number of pictures, a sanctus bell, a canopy or baldacchino over the holy table and a monstrance. This petition initiated what I have referred and shall continue to refer to as the earlier proceedings. The grounds on which the petition was based may be summarized as follows: that each of the articles had been placed within the church since its consecration without a faculty; that each was an illegal ornament or decoration; and that each was likely to be, and in fact was, the object of superstitious use and of superstitious reverence and regard.

It is unnecessary to examine in detail the vicissitudes which attended the institution and conduct of the earlier proceedings, except to say that on July 15, 1931, a copy of the citation was served on Mr. Walke personally, but no appearance was entered by him or by either of the then churchwardens. Mr. Walke, in a written statement supplied to the chancellor, explained that he was unable, on what he described as grounds of conscience, to recognize the jurisdiction of the court.

An appearance was, however, entered on behalf of the Archdeacon of Cornwall, but to his own regret the learned chancellor was compelled to rule that the archdeacon had no locus standi. It was pointed out when the chancellor delivered his judgment in the earlier proceedings, and should be repeated here for the purpose of avoiding misunderstanding, that the archdeacon would not have attempted to justify the retention in the church of all the articles complained of in that petition. Unfortunately, through no fault of Miss King or her associates, but as a direct consequence of the inability of the then incumbent to recognize an existing fact, namely, that the jurisdiction in a matter of this kind is in the consistory court, the petitioners were the only parties then heard.

Sir Philip Baker Wilbraham delivered his judgment on March 9, 1932, the consequent order being drawn up on April 14, 1932. To this judgment I shall have occasion to refer later. In dealing with other aspects of this case the learned chancellor, in the course of the judgment from which this appeal is brought, deplored the fact that he had before him only an abbreviated version of his predecessor's judgment. I have been more fortunately placed, inasmuch as I have been provided with a shorthand note of that judgment, which has been copied and rendered available to counsel on both sides, and they have, as I understand it, accepted this transcript as containing a correct record of the earlier judgment. For the purpose of these introductory remarks the important features of this judgment and what followed it are these :

An order was made for the removal from the church of a number of the articles complained of, or to put the matter more accurately, an order was made authorizing the then vicar and churchwardens to remove the articles, and in default of their acting on this authority, authorizing the petitioners to remove them. The then vicar and churchwardens, as may readily be believed, took no action directed to give effect to the chancellor's determination of the rights in the matter, and accordingly the authority in favour of Miss King became operative and was acted upon, and the articles which the chancellor had decided in the then existing circumstances to be illegal, were removed. The articles which were authorized to be removed, if they ever were removed at all, were immediately replaced, by or with the connivance of the then vicar, in the places in the church which they had previously occupied. There were exceptions of no materiality, but which I mention so as to indicate that I have not overlooked them: a stone which contained an inscription was removed and was not replaced, probably for the reason that the stone immediately behind it and which was exposed to view by the removal, contained an exactly identical inscription, and a monstrance and a canopy over one of the altars disappeared from the scene. This state of facts would have been bad enough; what actually happened was worse still. In fact, the articles that were removed from the church were not the original articles at all, but in the interval which decency and good order prescribes between the date of the making of the order and its execution, the then vicar caused or permitted imitations or fakes to be made and put up in the place of the originals for the purpose of deceiving the persons by whom the order was executed. Accordingly, as a result of this carefully planned stratagem, when the licence of the chancellor came to be executed, the originals had been removed to a place of safety, which was illegal, and the fakes had been put up in their place, which was dishonest. The order or licence was executed on the fakes, and the originals were put back immediately to those places from which they had been taken. This evidence was apparently accepted as representing the true state of facts by the chancellor in the court below. In any event it is abundantly plain that the law was deliberately flouted and defied.

It is important at this stage to make two observations—

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firstly, that the conduct to which I have just referred had nothing whatever to do with Mr. Roffe-Silvester, the present incumbent. He was not connected with the parish at that time and in his personal capacity cannot be held to be responsible for them in any shape or form. Moreover, from the consistently proper attitude which Mr. Roffe-Silvester has maintained in these proceedings in this Court and in the court below, it is, I think, clear that he would be the first to deplore methods such as I have described. The second is this, that when I say that the law was flouted and defied, I am not moved by any particular tenderness towards the dignity of the law or of any particular court. Where a number of people are united in a community, whether it be a community such as the Anglican Church which is established by law, or a community created and governed by contract, the mutual rights, obligations and duties of the members of the community must be measured and determined by rules of some kind. In the case of an association such as a trade union, those rights, obligations and duties are defined by rules which the members contract to observe. In the Church, that institution being established by law, the rights, duties and obligations of its members are defined by the law of the land, and are protected and preserved by the courts which exist for the purpose of seeing that the laws are observed and obeyed. The illegal conduct which I have outlined was a deliberate deprivation of Miss King and others of those rights which they, as parishioners, enjoyed in this building. Having instituted proceedings in the appropriate court, and having obtained an order which to some extent was the order they sought, they were placed in the humiliating and impossible position of finding the rights which they were entitled to enjoy, and which they had asserted and established by legal, orderly and proper process, instantly and immediately snatched away from them by conduct which it would be charitable to describe merely as being grossly illegal. As must inevitably be the case when people are robbed of the rights which the law accords them, and which the law is supposed to protect and if necessary enforce, these people were driven to adopt a course of conduct of which it is impossible to approve. It is with reluctance that I deal with this aspect of the matter. The facts can be stated all the more shortly for reasons—of happy augury—which will hereafter, in the course of this judgment, appear. Miss King, and others who had suffered as she had suffered, made a practice of attending the church, placing themselves in a prominent pew during the celebration of services of which they disapproved, not for the purpose of taking any part in the worship, but as a protest against what was going on. On one occasion Miss King was guilty of brawling in the church and after an application to the Divisional Court (1) was convicted by the local magistrates and subjected to a nominal fine. The learned chancellor, in his judgment in the court below, expressed his disapproval of the entirely mistaken conception of duty which prompted this behaviour. Beyond associating myself with what fell from the chancellor on this matter, which lost nothing in emphasis from the moderation of the language in which it was couched, I say no more except this: that though I am shocked at what Miss King did, I cannot say that I am surprised. Miss King had been a parishioner for many years. For a matter of close on a quarter of a century her rights, not only in matters connected with the ornaments and decorations of her parish church, but also in the services which she was entitled by law to have celebrated therein, were consistently ignored, and when she obtained legal redress for some of the injury she had sustained, that redress was rendered nugatory by further acts of lawlessness on the part of her parish priest. The worst feature of this aspect of the case is that this behaviour was continued during the incumbency of Mr. Roffe-Silvester. For this there was no excuse. Happily, most happily, these episodes are now ended. In the course of the hearing of this appeal Mr. Ashworth, on behalf of Miss King, volunteered an undertaking that this course of conduct should not be repeated. This was not the sort of undertaking volunteered by an adroit and tactful advocate to escape from what he knows to be an untenable

(1) *Matthews* v. *King* [1934] 1 K. B. 505.

position. It was a suggestion, as I was able to observe, graciously and spontaneously put forward by Miss King herself to her counsel, which was immediately and as graciously welcomed and accepted by the vicar through the mouthpiece of his leading counsel, Mr. Vaisey. Reverting to the history which led up to these proceedings, Mr. Roffe-Silvester, who succeeded Mr. Walke, started his active duties on or about May 18, 1937. The chancellor has found, and I freely and gladly accept his findings which have been confirmed by Mr. Roffe-Silvester's attitude throughout this appeal, that Mr. Roffe-Silvester came to the parish with every intention of being a good parish priest to all parties in the parish in the very difficult circumstances for which he was in no way responsible. He had, as the chancellor points out, and as was emphasized by the Lord Bishop in an address he gave in the parish when Mr. Roffe-Silvester was instituted, to hold the balance between the Anglo-Catholic party, consisting of members some more and some less extreme, and a party holding extreme Protestant views. Unfortunately the long period of lawlessness, amounting almost to persecution, which preceded his incumbency, had borne its inevitable harvest. His reception was not encouraging. On April 19, 1937, the parochial church council passed two resolutions each by a majority, the first stating that the council objected and was irrevocably opposed to the appointment, on the ground that the nominee of the Dean and Chapter had systematically practised idolatry. The second resolution was directed to the formation of a committee to go into the matter of obtaining a faculty for removing illegal ornaments.

At some later date the parochial church council, by a majority of twelve votes to nine, passed a resolution supporting the petition of Miss King in the present proceedings.

It is to be deplored that with the arrival of a new vicar everybody connected with the parish should not have endeavoured to start a new page; but I cannot forget, as no doubt Miss King did not forget, the injustice of the preceding period of nearly a quarter of a century. It is, I believe, in the long run fortunate that evil has evil consequences; but fortunate or unfortunate, the sort of wrongs and grievances under which this parish suffered for years cannot be put right in a day.

Perusal of the petition which initiated the present proceedings shows that the articles scheduled in the petition comprised for the most part articles which had been dealt with by the preceding chancellor in the earlier proceedings. In addition, the schedule contained other articles which since the date of the earlier order had been introduced into the church by or with the approval of Mr. Walke, it is hardly necessary to add, without a faculty. It was but faintly argued by either side that so far as the articles in the present proceedings had been dealt with in the earlier ones, the matter was res judicata. For the reasons given by the learned chancellor I reject this submission, if indeed it was ever really put forward. While of course the utmost weight was attached here and in the court below to every finding of law in the judgment in the earlier proceedings, the facts in the two cases are different, and the chancellor from whom this appeal is brought in my judgment rightly took the view that decorations which might well have been illegal during the incumbency of Mr. Walke, owing to actual or apprehended misuse, can with safety be left in the church to-day.

Accordingly, as regards a number of articles, the chancellor rejected the plea of Miss King and granted a faculty for their retention in the church subject to certain sufficient and proper safeguards. From that part of the order which was not in favour of Miss King, to use a phrase which I dislike in this context, but use for the sake of brevity, there has been no appeal. This affords, in my judgment, one indication that Miss King is actuated by the desire to see the law vindicated and the rights common to herself and the other parishioners recognized, established and protected, and not by the wish to prolong or extend the discord which has inevitably and most unhappily existed in the parish for something like a quarter of a century. Equally, it is apparent that Mr. Roffe-Silvester, on his side, has been actuated by the desire to do his duty and to bring peace and harmony to a distracted flock. If everyone concerned will follow these excellent examples, there is good reason to hope that this litigation will mark not only the end of an epoch which, though doubtless productive of much good, has also wrought much harm, but also the inauguration of a new and happier and more Christian state of affairs in the parish.

Vaisey K.C. and *Geoffrey Hutchinson* for the appellant. This is an unusual case, for it relates to a state of things to which the appellant succeeded and did not create. To deal first with the question of the stone altars. Five of these were the subject of a petition to the consistory court seven years ago, when no order for their removal was made ; the matter is therefore res judicata. Moreover, the object of the present petition is really to stop certain services alleged to be illegal, no objection being taken to the various objects themselves but to the use to which they are put. That is an abuse of the procedure of the consistory court, and these matters should have been dealt with under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), or the simpler procedure under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), which Acts provide safeguards for clergymen charged with offences against doctrine. Consistory courts were never intended to try charges of heresy. And again the court should have declined to hear the respondent, who had been convicted of brawling in this very church (1), on the ground that she was not the kind of parishioner who was entitled to put the court in motion. Therefore this order, made on her petition, ought to be set aside.

It is admitted that these are altars. All that the appellant asks is that they should be left alone ; a confirmatory faculty is not asked for. There is no reported faculty case in which a stone altar has been ordered to be removed, though there are cases where there has been a refusal of a faculty to erect one. This is significant in view of the fact that a large number are still in existence, amounting in 1857 to some two hundred. (2) They are not so illegal as to justify an order

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(1) See *Matthews* v. *King* [1934] 1 K. B. 505.

(2) *Liddell* v. *Beal* (1857) Moore's Special Report, 1, 18.

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for removal, though a faculty to erect might be refused. That was the course taken in *Faulkner* v. *Litchfield* (1), though no doubt the reason for that was explained in *Liddell* v. *Beal* (2) as being referable to the mode in which the case came before the Court of Arches. It has been the practice not to interfere with pre-Reformation altars (3), though it might be thought that an altar which had been the scene of superstitious Romish use would be more objectionable than altars erected in more modern times. But, if the respondent is right, the practice of non-interference with pre-Reformation altars is wrong, for according to her contention the rule ought to be that a stone altar whenever found ought to be removed. Can it be the law, that, if a parishioner, who may not even be a Churchman, goes to a consistory court and says: " Here is a stone altar," that there can be no argument, but that the court must make an order of removal, except, perhaps, in the case of a pre-Reformation altar? It is submitted that a chancellor has some discretion in these cases: see *St. Luke's, Chelsea* v. *Wheeler* (4) and *In re St. Mary, Madingley.* (5) If the law were as contended for by the appellant, one must consider its effect on Christianity and the work of the Church. Ought not a Christian court, having a discretion, to say that in these circumstances more harm will be done than good by the removal of these altars? They are associated in the minds of many of the parishioners with their late pastor, Father Walke, as being those at which he administered Holy Communion, and he was regarded with great affection. An altar becomes such if used as an altar; there is no separate ceremony of dedication, but it is consecrated with the church. If an unqualified order of removal is made by the Court it is asked that it be suspended for a year to give the Legislature an opportunity to intervene. The case of *Rector, etc., of Hayes* v. *Fulford* (6) shows how Dr. Tristram, a purist in these matters, could act without too great rigidity. [Talbot's Modern Decisions on Ritual, pp. 8–12, was also referred to.]

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(1) 1 Rob. Eccl. 184.

(2) Moore's Special Report, 129–130.

(3) *Rector, etc., of Hayes* v. *Fulford* [1910] P. 18, 21.

(4) [1904] P. 257.

(5) [1910] P. 18, 23*n*.

(6) [1910] P. 18.

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With regard to the aumbries. The one on the high altar is simply a recess in the wall of the church, and there cannot be an order for the removal of a recess. This is really an attack on the practice of reservation and the application is not, therefore, made bona fide. But assuming that the practice is illegal, it is in fact adopted in many churches, among others, by the appellant in this church. If so, there must be some place to put the sacrament, for it must be protected from the kind of desecration to which it might be exposed in this parish, and the only result of an order of removal would be that another place would be found. Such an order would be the same thing as not to prosecute a burglar but to take away his house-breaking tools. The chancellor ought, therefore, in the interests of decency, to grant a faculty for these aumbries.

J. P. Ashworth for the respondent. The chancellor had no discretion ; stone altars are illegal—*Faulkner* v. *Litchfield* (1)—and where one finds an article in a church which, beyond question, is illegal, the court must order its removal. An altar is not an ornament: *Faulkner* v. *Litchfield.* (2) It is true that in that case the Dean of Arches (Sir Herbert Jenner Fust) did not admonish the churchwardens to remove the altar, but that was owing to the fact that that was not an original suit but an appeal, and all the Dean of Arches was asked to do was to confirm or reverse the decision of the chancellor to grant a faculty: *Liddell* v. *Beal.* (3) The only case where the court may have a discretion is where the altar dates from the time of the Reformation, the presumption being that it was there with the consent of the Bishop. There is no reported case of anybody trying to remove such altars. As the church of St. Hilary stands at present, there is no holy table. It is no justification for not ordering the removal of these altars to say that their removal would hurt people's feelings : see *Bradford* v. *Fry.* (4) No doubt the paramount consideration of the chancellor should be, what course would bring peace and unity to the parish; but to secure that he

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(1) 1 Rob. Eccl. 184.

(2) Ibid. 254.

(3) Moore's Special Report, 83.

(4) (1878) 4 P. D. 93, 100.

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cannot pass over illegality. Æsthetic considerations alone should not be entertained, and, indeed, who is to say what is beautiful and what is not ?

Vaisey K.C. in reply. The court should not deal with this purely as a question of law. The court is part of the Church whose primary duty is the furtherance of the Master's work on earth, and it should override the strict law where its application interferes with that duty. It should regard the good of the parish as a whole. It would not hinder the work of an Evangelical incumbent by forcing on him ornaments which offended his people ; so it should not hamper the work of one whose congregation has been accustomed to value the presence of certain ornaments. The feelings of people should be considered to some extent.

If a holy table is provided and the law is thus satisfied, it would not be necessary to remove the remaining stone altars, and the court would have a discretion to allow them, subject to an undertaking as to their use.

Cur. adv. vult.

1938. Oct. 21. The learned DEPUTY-DEAN read the following judgment. [Having set out the facts as above, the judgment continued :] Before turning to the specific articles which are the subject-matter of this appeal, Mr. Vaisey made two submissions of general application with which I ought to deal. The first was that the consistory court in view of the past conduct of Miss King, prolonged as it was into the incumbency of Mr. Roffe-Silvester and indeed up to the hearing in the consistory court, ought to refuse even to entertain Miss King's application regardless of its merits. In view of the atmosphere of conciliation which seemed to me to be gaining ground as the appeal progressed, this argument, though not actually abandoned by Mr. Vaisey, was not pressed. I reject it in toto. It is impossible to apply the same tests to proceedings such as these as would be properly applicable in civil proceedings where merely the individual rights of the parties before the court are involved. I have referred to the parties in this case. It would be more accurate

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to describe the parties as spokesmen, and, though each has a personal interest in the matter, there are many others whose interests are directly involved but whose names do not appear as parties on the record. But I go further. Even if Miss King stood alone in this matter, it would be deplorable if a parishioner who had been deprived of her legal rights for a long period of years should be for ever precluded from asserting them solely by reason of conduct, however ill-considered, which was the direct, if not the inevitable, consequence of the denial of the protection to which she was entitled.

Mr. Vaisey secondly argued that Miss King's motive and only motive was to put an end to services, ceremonies and practices which she disliked and of which she disapproved, and that the faculty jurisdiction of the consistory court ought not to be used for the purpose of enforcing discipline on the clergy for which other machinery is available. It is sufficient to dispose of this contention as applied to the facts of this case by holding, as I do hold, that Miss King's sole motive was not to put a stop to illegal services. During the incumbency of Mr. Walke, that there were services which she disliked and of which she disapproved there can be no doubt; but dislike of the services does not preclude her from disliking illegal ornaments or illegal decorations. Miss King disliked both Mr. Walke's services and the ornaments and decorations which he introduced into the church. Her principal motive is, I think, the very proper one of rescuing the law from the contempt into which it has fallen and establishing the rights of church people, including the right to have those rights determined in accordance with the law and not the caprice or whim of any particular individual. Moreover, since a test, and, as Mr. Vaisey argues, the only test, of the legality of a decoration is whether or not it is or is likely to be connected with superstitious regard, or illegal abuse, it follows that some investigation into the services and practices which prevail in a particular church must be made where these issues are involved in a faculty suit.

I will now deal with the specific articles which are the subject-matter of this appeal.

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The first series of articles consists of six stone altars fixed to the body of the church, three at the east end, one each on the north and south walls, and the sixth on the west wall of the church. Five of these altars were comprised in the earlier proceedings. One of them placed in the south-east corner of the church was erected in 1934, as I have already pointed out, without a faculty. To avoid misunderstanding I shall in this judgment use the terms "holy table" and "illegal altar" as meaning respectively a communion table which in all respects complies with the law, and one which does not comply with the law, and I shall employ the word "altar" as a neutral and comprehensive term. In passing I would point out that the learned chancellor in the earlier proceedings expressed himself bound to hold that the five stone altars which were the only altars in the church at that time were illegal, but he made no order for their removal. This was without prejudice to the consideration at some future date of a scheme for dealing with them or some of them, should it be found necessary, but he expressed the hope that it might prove unnecessary to disturb them. Soon after the Reformation a controversy as to the rival merits of the stone altar and the holy table of wood arose and raged round the actual words themselves and the material out of which the article was made. The altar of stone was regarded by some as indicative of the celebration of the sacrifice of the real presence while the table of wood was regarded as appropriate to the conception of a commemoration or feast. If there is any one left who wishes to study this controversy, they will find in the judgment of Sir Herbert Jenner Fust, in the case of *Faulkner* v. *Litchfield* (1), to which I shall refer later on, a storehouse of learning on this topic.

In the year 1559 in an injunction issued by Queen Elizabeth appears this passage: "In the order whereof (that is of "altars and holy tables) saving for a uniformity there seemeth "no matter of great moment so that the sacrament be duly "and reverently administered." That the matter cannot have gained in importance since then is shown by the following

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(1) 1 Rob. Eccl. 184.

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facts. The word "altar" is used continually in the order of the Coronation service. It appears in Acts of Parliament relating to churches and it is and has been for years in habitual use on the lips of many Churchmen as synonymous with the holy table. There were in evidence before me in the form of an agreed statement of facts, certain schedules, which can be treated as incorporated in this judgment. They show that in addition to some pre-Reformation stone altars, stone altars have been installed in new churches or when an old church has been rebuilt after destruction in a number of cases as far back as the year 1839 and as recently as the years 1937 and 1938, and that these churches are distributed among fifteen different dioceses: that stone altars have been installed by faculty in no less than fourteen dioceses, the most recent example being this year, though it was conceded that in none of the cases where a faculty was granted had there been any opposition or hearing. It was also admitted, and is probably common knowledge, that Westminster Abbey and a number of other extra-parochial churches have stone altars. I venture to think the vast majority of church-going people, when they attend a celebration of Holy Communion, do not attach any significance whatever to the material of which the holy table is made, or whether it is called "the altar" or "the Lord's table" or "the holy table." This is, however, only a surmise on my part, and there is no evidence before me to support it.

It is the question of these stone altars which in my judgment gives rise to the only questions of law of any real difficulty in this case. As it is certain that the chancellor will have at some later date to consider the practical application of the order he has made so far as it is affected by this judgment, it will be, I think, convenient if I set out what I think, taking the order and the material passages in his judgment, the chancellor has decided. In my judgment, he held: (1.) That each of the altars being made of stone and immovable is illegal per se. (2.) That the altar being illegal, the chancellor, as a matter of law and not of discretion, is precluded from granting a confirmatory faculty for any one

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of them. (3.) That though in a very exceptional case, as where the stability of the building might be endangered by the removal of an altar, he might have a discretion, in each of the six cases before him he had no discretion in the matter, but must as a matter of law decree a faculty for its removal. (4.) That each of the six altars was on the same footing and must receive the same treatment. In coming to this decision, the chancellor felt himself compelled (I take the word from his judgment) by the authorities cited to him and to me to take the course he did. Accordingly, he made an order which in effect authorized the removal of the six altars subject to the work being done under his supervision, a necessary and proper safeguard.

It therefore becomes necessary to consider the authorities which compelled the chancellor to come to this conclusion. The first is the case of *Faulkner* v. *Litchfield* (1), where it was held by the Court of Arches, reversing a decree of the consistory court of Ely, that the stone altar in a parish church was illegal and that accordingly no confirmatory faculty could be issued. The Dean of the Arches in that case stated quite clearly that the refusal of a confirmatory faculty was not a matter of discretion but of law. The basis of that decision was that the stone altar in question was not an ornament. If it had been an ornament, it would have been protected by the ornaments rubric, which can be found in the Prayer Book immediately before the order for Morning Prayer. The passage in the judgment to which I have just referred is as follows (2): " There were two or three arguments urged "by the counsel for the respondents, which I will not pass "over unnoticed. One was founded on the order in the "Prayer Book, which immediately precedes the Morning "Service; 'that such ornaments of the church . . . . shall "' be retained, and be in use, as were in this Church of England "' by the authority of Parliament, in the second year of the "' reign of King Edward VI.'; and it was contended, that as "Stone Altars were then in use, they, being *ornaments*, are "now to be retained. To be sure, were that argument valid,

(1) 1 Rob. Eccl. 184.

(2) Ibid. 254.

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"not only is this Stone Altar or table proper, but no other "species of table ought to be erected. Durandus was cited, "to show that the altar is to be considered an *ornament* ; but "it seems to me that that writer is an authority the other "way." Then he cites a passage from Durandus and proceeds : "The altar is nowhere, that I can find, enumerated amongst "the ornaments of the Church or choir."

This decision was considered ten years later in the case of *Liddell* v. *Beal* (1), which was heard by Dr. Lushington in the consistory court, by Sir John Dodson in the Court of Arches and ultimately in the Privy Council. Each one of those Courts followed the decision in *Faulkner* v. *Litchfield* (3) and approved the reasoning on which it was based. Mr. Vaisey has contended that these decisions are now obsolete, inasmuch as since they decided that the altar is not an ornament it must follow that it is a decoration and that later decisions of equal authority decide that the test and the only test of the legality of a decoration is whether or not it is or is likely to be connected with superstitious regard or illegal use. While I felt the full force of his argument, in my judgment this Court, like the consistory court, is bound by the two decisions and accordingly must hold that the altar of a parochial church, if made of stone, is illegal, and that where the altar in a parish church is of stone, no confirmatory faculty can be issued for its retention. Whether these judgments on these matters are to-day open to review in the light of more recent cases, is a question which in my judgment must be left to the determination of the Privy Council.

The next point I have to consider is whether the chancellor was right in deciding that he must treat all of these six altars alike. If there had been only one altar and that an altar of stone in the church, in my judgment on the facts and circumstances of this case the chancellor was compelled to authorize the removal of that altar and substitute the holy table which the law prescribes. Mr. Vaisey contended that even so, as there were six altars, the chancellor was not compelled to authorize the removal of

(1) Moore's Special Report. (2) 1 Rob. Eccl. 184.

any one of them, but that the right course to pursue was to make application for authority to put up a holy table. In my judgment this submission goes too far. Each of the offending altars cannot, I think, succeed in establishing a sort of ecclesiastical alibi because of the presence of the remaining five. The place now occupied by what is described as the high altar, an expression which so far as I know has no particular significance in an Anglican church, is the place where the holy table which was illegally moved without a faculty used to stand. Whether the chancellor has a discretion in the matter or whether he has not, in my judgment his decision on this point was right in substance, and the order which directed the removal of the high altar and the substitution of a holy table must stand. Once, however, that has been effected and the church has been equipped with its holy table, in my judgment the situation of the remaining five altars is wholly changed. *Faulkner* v. *Litchfield* (1) and *Liddell* v. *Beal* (2) decided that every church must have a holy table and that the holy table must be movable and made of a certain material, namely wood. Those decisions in my judgment have no bearing on what I may call subsidiary altars in chapels or side aisles of a parish church.

It must be remembered that in 1845 and 1857, when the two cases to which I have referred were respectively decided, although there may have been in existence parochial churches containing two altars, it was not until many years later that any application was made for a faculty for a second holy table in a parochial church. At that time, namely in 1845 and 1857, it was contemplated that every parochial church must have one holy table and one holy table alone, and those cases were directed to that state of facts and to nothing else.

To state it shortly, in my judgment the holy table of a particular church was put into a category by itself and not into the category either of ornaments or decorations. Once a parochial church is properly equipped with its holy table any subsidiary altar in my judgment must be treated as a decoration and must be subject to the same tests as are

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(1) 1 Rob. Eccl. 184. (2) Moore's Special Report.

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applicable to decorations as such. By this I do not mean, and I must not be understood to mean, that the chancellor, when he comes to consider what is to be done with each of the altars now in question, should lose sight of the fact that they are in appearance altars and are intended to be used as such. As I have already said, every parochial church must have its holy table. Subject to this the significance attached to the word "altar" is derived from the use to which it is put. There is, so far as I know, no service prescribed for the consecration of an altar as such. An altar is consecrated with the rest of the church in which it is situated. The judgment I have expressed on this point is confirmed by the numerous decisions, all much later in date than 1857, in which faculties have issued for the installation of a second altar in a church. The holy table in a church must be made of wood and must also be, it appears, movable; but where faculties have been issued for the installation of a second altar the faculty as a general rule, if not invariably, prescribes that the second altar shall be in a particular place. In fact, emphasis has been laid in some cases on the fact that the place where a second altar is authorized is either a side chapel or closed in to such an extent as to be almost a separate entity, which negatives the view that a second or subsidiary altar is on all fours with the holy table of the church. Moreover, if the decisions in *Faulkner* v. *Litchfield* (1) and *Liddell* v. *Beal* (2) only deal with the holy table of a parish church as such, and do not declare that every altar made of any material but wood must be ipso facto illegal in the Anglican Church, this affords at once an explanation why in extra-parochial churches, from Westminster Abbey downwards, altars of stone are constantly found. Even if this view is wrong, and if every altar in a church stands on the same footing and is governed by the two decisions I have cited, there yet remains the question whether the chancellor, granted that a stone altar is illegal per se and granted that he has no jurisdiction to issue either a faculty for the introduction of a stone altar into a church or a confirmatory faculty where he finds one installed,

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(1) 1 Rob. Eccl. 184.

(2) Moore's Special Report.

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is bound to issue a faculty authorizing the removal of the altar regardless of all other considerations and even though it may have stood in the church for centuries and though the unanimous desire of the parishioners is to have it retained.

In my judgment, in regard to the high altar in the present case, the question is merely one of academic importance. I have already indicated that on the facts of this case that altar must go and the holy table put in its place. After considerable hesitation I have come to the conclusion that the chancellor has a discretion in the matter, and that I am not precluded by authority from holding the contrary. It must be remembered that while in 1857 a consistory court in the exercise of its faculty jurisdiction could order the churchwardens to remove a particular article from the church, which monition, in the event of disobedience, could be enforced I believe by excommunication, the consistory courts to-day in the exercise of their faculty jurisdiction have no coercive powers. The order of the court is not really an order at all but is an authority or licence issued to some person or persons permitting, not requiring, something to be done. Consequently, if the altar of a parochial church was made of stone and no application was made for a faculty for its removal, or if application were made and a faculty issued but no action taken thereon, the altar would remain where it was, with the result that the discretion would then seem to lie not in the court but in the parishioners—a state of affairs wholly unsupported by authority and contrary to reason and common sense.

The view that there is a discretion is further fortified by a passage from the case of *Rector, etc., of Hayes* v. *Fulford* (1), a decision of the consistory court of London: "I should mention "that the practice is, where a stone altar is found in a church "that has been there probably since the Reformation, not "to remove it."

It is true that there is no trace of any case, certainly not in modern times, where a parishioner has had the temerity

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(1) [1910] P. 18, 21.

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to apply for a faculty authorizing the removal of an altar made of stone which has stood in a parish church since pre-Reformation times. If such an application were made, it could in my judgment only be refused on the ground that the chancellor had a discretion in the matter, unless it is said that the fact that a particular altar has centuries ago been used in connection with what some people may regard as an idolatrous and heretical rite affords a sound basis for its retention in an Anglican church, and gives it priority over other altars almost equal in age but which were introduced after the Reformation. Mr. Ashworth in the course of his admirable argument urged on me that the authorities establish that the chancellor has no discretion in the matter. He was unable to call my attention to any decision directly on the point that, where an illegal article has been placed in a church and an application is made for a faculty to remove it, the chancellor has no discretion to make an order but must, regardless of all other considerations, decree the removal of the article because of its illegality. He said, however, that that was the effect of the decisions in *Faulkner* v. *Litchfield* (1) and *Liddell* v. *Beal.* (2)

In *Faulkner* v. *Litchfield* (1) the churchwardens prayed for a confirmatory faculty of the stone altar which they had placed in the church. The vicar resisted the application and, as appears quite clearly from the pleadings in that case, cross-petitioned for a monition directing the churchwardens to remove the stone altar and to substitute a holy table made of wood and movable in its place. On appeal to the Court of Arches the whole cause was retained by that Court, and as appears from the order that was made, which is set out at the end of the report, the decision of the consistory court was reversed. The prayer for the confirmatory faculty was rejected and the order went on to reject the prayer made on behalf of the vicar that the churchwardens be monished to take down and remove the communion table of stone. Neither in the pleadings nor so far as appears from the report in the course of the argument was it so much as suggested that

(1) 1 Rob. Eccl. 184.

(2) Moore's Special Report.

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the Court of the Arches had no jurisdiction to entertain the prayer for monition.

Sir Herbert Jenner Fust, who was the Dean of the Arches and the Master of Trinity Hall, and whose judgment in that case is a monument of learning and research, said as follows (1): "In coming to this conclusion, I do not go so far as to "admonish the churchwardens to remove them"—that is the illegal altar and the illegal credence table. "All I can do is, "to refuse to confirm the sentence of the court below." Looking at the report it would appear that the learned Dean of the Arches considered that he had a discretion limited to making no order for removal. For while he refused the confirmatory faculty he rejected the prayer for a monition to have the offending altar removed. Mr. Ashworth, however, contended that this omission on the part of the Dean of the Arches was explained in *Liddell* v. *Beal* (2) both by Dr. Lushington in the consistory court and by Sir John Dodson when the case came on appeal to the Court of Arches. Dr. Lushington dealt with the matter in this way (3): "In the case of "*Faulkner* v. *Litchfield* (4), Sir Herbert Jenner Fust reversed "the decree of the court below, granting the faculty which "had been prayed, but he did not admonish the church-"wardens to remove the Communion Table or the credence "table. It is necessary to explain why the decree was made "in that form. The proceeding before the Court of Arches "was not an original suit, but merely an appeal, and the only "prayer which could properly be made by the appellant was, "the reversal of the decision of the Court below granting the "faculty; this the Dean of the Arches did, and he could not "in that form of proceeding have admonished the church-"wardens to remove the tables. I believe I take a correct "view of what Sir Herbert Jenner Fust did, and his reason "for not doing more, because, having declared these matters "to be illegal, I apprehend that, if the form of proceeding "allow, no alternative is left to a judge but to cause that "which is illegal to be removed; it would be contrary to all

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(1) 1 Rob. Eccl. 259.
(2) Moore's Special Report.
(3) Moore's Special Report, 83.
(4) 1 Rob. Eccl. 184.

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"sound reason for a judge to be called upon to pronounce his "judicial opinion that things were contrary to law, and at "the same time to leave them to continue in defiance of the "law." And Sir John Dodson took an identical view and said (1): "It has been said that the case of *Faulkner* v. "*Litchfield* (2), was distinguishable from the present, inasmuch "as the Court in that case, although it pronounced the stone "altar to be illegal, did not order its removal. But that "apparent difference is attributable altogether to the mode in "which the case came before it. In that case a faculty had "been granted by the decree of an inferior court, confirming "the erection of the stone altar. From that decree an appeal "was brought to the Arches Court, and the learned Judge "reversed the decree appealed from. It was not competent, "under the circumstances of the appeal, to go further; but "there can be no doubt that if the suit before him had been "for the removal of the Altar, he must have decreed it." Mr. Ashworth has pressed on me kindly but firmly the submission that the opinion expressed by Dr. Lushington in 1855 and concurred in by Sir John Dodson in 1856 as to the procedure in force in the ecclesiastical courts in 1845 is more likely to be correct than the view I had taken of the pleadings and order in *Faulkner* v. *Litchfield* (2), and on this point I am not disposed to disagree with him. The matter is not perhaps of any great importance, as, even if the explanation given by Dr. Lushington and Sir John Dodson of the order made in *Faulkner* v. *Litchfield* (2) is wrong, the fact that they were driven to seek an explanation, even a wrong one, why Sir Herbert Jenner Fust had not directed the churchwardens to remove the stone altar, emphasizes their view that, if he had had jurisdiction, he had no discretion in the matter but was bound as a matter of law to direct the removal of the stone altar.

These observations were, however, strictly speaking merely obiter, although entitled to the greatest possible weight. Further confirmation of the existence of the limited discretion is derived from the fact that in the earlier proceedings the

(1) Moore's Special Report, 129, 130.

(2) 1 Rob. Eccl. 184.

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then chancellor and now the Dean of the Arches refused to give an authority to remove the altars and expressed the hope that they would remain in the church. For the reasons I have given, and further taking into account that both *Faulkner* v. *Litchfield* (1) and *Liddell* v. *Beal* (2) were directed to the only communion table in the church and not to an altar subsidiary to the holy table in a side chapel, in my judgment, as regards the five tables, the chancellor has a discretion not merely to refrain from issuing a faculty authorizing the removal of all or any of the five altars, but can, if in the exercise of that discretion he so decides, grant a faculty authorizing their retention. When the time comes for the chancellor to consider these matters, I do not wish to say anything that will fetter the exercise of his discretion in any way, and any party to these proceedings will be at liberty to advance any grounds or matters of fact calculated to influence the discretion of the chancellor one way or the other.

Among the matters that he will be entitled to consider are in my judgment the following: The number of the subsidiary altars; the fact that they were introduced into the church without a faculty; practical considerations such as whether they or any of them tend unduly to darken the church, and æsthetic considerations such as whether their retention tends to beautify it or the reverse. In the case of one of the altars, the fact that it is a memorial to a dead person should not be lost sight of. Another factor which the chancellor may consider is the unity of the parish, or, as Mr. Vaisey put it, the spiritual good of the parish as a whole, which is probably another way of stating the same thing. This list is not intended to be exhaustive, but to assist, and not to hamper, the chancellor in the exercise of a discretion which is his and not mine. As a result of my decision on this point the chancellor's order will require modification.

Before passing from the question of the altars, to avoid any possibility of future misconception, I would add that I have

(1) 1 Rob. Eccl. 184.

(2) Moore's Special Report.

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not considered, and no argument has been addressed to me on the question whether the earlier cases of *Faulkner* v. *Litchfield* (1) and *Liddell* v. *Beal* (2) are no longer the law so far as they decided that the holy table of a parochial church must be movable.

The next articles with which I must deal are two tabernacles or aumbries, one in a steel safe in the wall at the back of what has been called the high altar, to which access is obtained through a door in a wooden structure which serves at once to support the crucifix and as a cupboard, the other also in a safe in the wall above and behind the altar in the south chancel aisle which has been called the Jesus altar. No grounds have been advanced which satisfy me that the decision of the chancellor on this point was anything but right, and I affirm his order authorizing their removal.

I was pressed by Mr. Vaisey to give some judgment which would decide once and for all whether the practice of granting faculties for aumbries, where the sacrament was reserved, was right or wrong. To accept this invitation would, in my judgment, be going far beyond the functions of the appellate court. I am here to determine the law as applicable to the facts of this particular case and nothing else. Mr. Vaisey, on behalf of Mr. Roffe-Silvester, said with great frankness that Mr. Roffe-Silvester was accustomed to the practice of reservation, and at any rate so long as he was in this parish could not give it up. He urged, on the assumption, but without making any admission, that reservation is unlawful, that there was a dilemma in churches where reservation was illegally practised, since either there was no receptacle in which the reserved sacrament could be kept decently in safety, or the incumbent was driven to provide such a receptacle in the church without faculty, and that the escape from this dilemma was for this Court to pronounce that wherever reservation was practised in fact the chancellor ought, in the interests of decency, to grant a faculty authorizing a safe and seemly receptacle. It is no part of my duty to make any such pronouncement. In any event, in my judgment the escape from the dilemma is for the priest to abandon an illegal practice and not for the consistory court to aid and abet him in the illegality. The observations I have just made relate to the submissions made on the facts of this case, and are not directed in any way to other cases where the sacrament is reserved with the approval of the Bishop, and application is made to a consistory court for provision to be made for its proper and decent reception.

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(1) Rob. Eccl. 184.

(2) Moore's Special Report.

It was further suggested that two passages in the judgment of the learned chancellor relating to the two aumbries lent themselves to ambiguity. The one indicating that he had no discretion in the matter at all and must in any event refuse every application for a receptacle for the reserved sacrament in a church no matter what the circumstances might be; the other indicating that he might, at some future date, entertain an application by the vicar for an aumbry differently situated to the two to be removed. I see no ambiguity whatever in the chancellor's judgment. He has made it clear that his judgment does not preclude the vicar at some future time from applying to him for a faculty authorizing an aumbry, and, while it will be open to any person interested to oppose that application, it cannot be on the ground that by reason of the judgment given in this case the matter is res judicata. Neither the chancellor nor this Court has prejudged any such application, nor do I intend to express or indicate any view as to how such an application, if it is made, should be entertained.

As regards the order relating to the two sanctuary lights, I see no ground for disturbing it. The two lights are closely connected with the two aumbries and they must share the same fate. The only modification I propose to make in the chancellor's order relating to the aumbries and lights is as follows: The order as it stands gives the vicar and the churchwardens one month from the date of the order to effect the removal of the aumbries and the lights. As regards the aumbry in or behind the high altar and the attendant lamp, this order will stand. As regards the other aumbry and its attendant lamp, I think it only right, in view of all the

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circumstances, that the vicar should have further time to consider his position and if so advised to make an application for an alternative place for reservation. Accordingly, I extend the time in relation to the second aumbry and light within which the vicar has authority to act from one month to three.

As regards the green and black crucifix, which at present stands immediately above the high altar supported by the wooden structure which leads to the safe in which I understand the sacrament is at present reserved, the chancellor has authorized its removal, and I see no grounds for interfering with his decision. There is no finding by the chancellor that this crucifix has been during the present incumbency the object of superstitious regard or that there is any danger of this happening. I cannot, however, shut my eyes to the facts that the removal of this crucifix was ordered in the earlier proceedings and that, while it stands, as it stands to-day, above the principal altar in the church, it may be a reminder of the illegalities and irregularities to which I have already referred. A crucifix is not intended to recall such things as these. In any event, as it is clear that the high altar itself will have to go, I suspend the operation of the order as to the crucifix until application is made to the chancellor in connection with that altar so that the matter may not go through piecemeal. As I have already said, the aumbry and the light must be removed or visibly and manifestly rendered incapable of being used for reservation. As the real objection to this crucifix is more to the circumstances under which it comes to be in the place where it now stands than to the crucifix itself, the order will be without prejudice to any application by any person interested, including, of course, the vicar, for a faculty to have the crucifix placed somewhere else in the church.

The next article is a tablet placed upon a granite shrine of the Virgin Mary inscribed with the words: "Holy Mother "of God pray for us and for those who came to the aid of "this church in 1933." After these words, as part of the inscription, follow the names of a number of parishes whose priests had assisted in the services of St. Hilary during the period when Mr. Walke was incapacitated by ill-health. Objection was taken to the inscription on two grounds, that it was illegal and that it commemorates, or is believed to commemorate, the acts of illegality already described.

As to the first point, I do not think that the learned chancellor attached any importance to it. Neither do I. On the second ground, while he accepted fully and absolutely, as I do, the evidence of the vicar that the memorial had nothing to do with the earlier proceedings, he thought that the mistaken belief that it did, would or might remain, accordingly he authorized the removal of the offending words. In my judgment the discretion of the chancellor was wisely and rightly exercised. As to the thurible, I hesitated for some time about the wisdom of extending the order to a thurible: a small metal chattel is in no sense a fixture in the church. On this point I feel the force of Mr. Vaisey's argument that the faculty jurisdiction was being used to restrain the vicar from the ceremonious use of incense. In any event, an order which authorizes Miss King to remove the thurible and then directs her to hand it to the vicar is in some danger of being rendered nugatory either in the letter or the spirit. On the whole I have come to the conclusion that inasmuch as a thurible is an article which in other cases this Court has held to be within the faculty jurisdiction, the doubts I entertain ought not to prevail and the order of the learned chancellor will stand.

Mr. Vaisey submitted that the confessional box had not been interfered with in the earlier proceedings, and that the matter was res judicata. The chancellor in the earlier proceedings did not decree a confirmatory faculty for the confessional box, nor did he authorize its removal; accordingly it remained in the church. This cannot constitute the matter res judicata. I am, however, absolved from the necessity of deciding whether the chancellor's order in this matter was right or wrong. Having heard stated in open court the vicar's views on confession and the use of the confessional box, Miss King in that spirit of conciliation which I hope and believe is spreading, stated that without giving up one iota

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of her principles, she was prepared not to press for the removal of the confessional box. She suggested, however, that in its present place it shut out a good deal of light, and the interior of the church would be improved either by moving the confessional box to some other part of it or by cutting down its height if it is to remain where it now is.

The result will be that the order for the removal of the confessional box will be set aside. No confirmatory faculty will be granted at this stage, but the vicar, or any party hereto, when it has been decided whether to cut down the height or to remove the confessional box to another part of the church, can apply to the chancellor for a confirmatory faculty in whose discretion the matter will then rest. To make it clear, when I say "Can apply to the chancellor," I mean, can apply in these proceedings without the necessity for issuing a fresh petition. On the other hand, if the confessional box is neither taken to another part of the church or shortened, Miss King can apply to the chancellor for a faculty authorizing its removal, and this application will not be prejudiced in any shape or form either in fact or in law by the concession, the scope of which I have endeavoured to indicate.

As regards three other articles, a blue votive lamp hanging before an image of the Virgin Mary, two wrought iron votive candlesticks and a sanctus bell, the appeal was not pressed as regards these, and the order of the chancellor will stand. The faculty authorized the removal of the words "Mary Help" from the stone base of a crucifix which the chancellor permitted to remain. This is a very small matter and one essentially in the discretion of the chancellor: I shall not disturb his order.

As regards costs, the chancellor in the court below ordered that each party should bear its own costs. I do not think there is any appeal as to this part of the order, and in any case, as the matter was peculiarly within the discretion of the chancellor, the order as to costs will stand.

It has been suggested and accepted by both sides, that the authority at present addressed to the vicar and churchwardens should be altered to an authority to the vicar and

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the churchwarden, the second respondent to the suit. I assent to this. The further modifications to the order can be agreed by counsel with general liberty to apply to me in chambers.

The order as to the six candlesticks on the altar, ordering the removal of four of them, is affirmed.

I hope I shall not be exceeding my functions if I add one word more. The order from which this appeal is brought is dated August 30, 1938. The hearing of this appeal began on October 10, 1938. Between those two dates, the inhabitants of this parish, in common with their fellow countrymen, have passed through a period when our land was menaced with a danger as great as any which a civilized state has been called on to face. The entire community was united in a common anxiety amounting almost to despair, knowing that a world war would establish the spiritual bankruptcy of this generation. I cannot believe that with this warning fresh in their minds, the people who live side by side, and will continue to live side by side in the parish of St. Hilary, will fail in their urgent duty to bring, by their individual effort and example, that peace which has been so long absent from this parish, and which it so sorely needs. Deliberately I have extended the time prescribed in this order for certain things to be done, so that the festival of Christmas, with its familiar message, may provide an opportunity to make a reality out of an aspiration. So far as it is competent for a court of law to determine these matters, I have endeavoured to determine them. The main task lies elsewhere. No two persons can think exactly alike. It is not true that because two persons hold diametrically opposite views about the same thing, one of them must inevitably be wrong. Truth is many-sided, and it may well be that each is seeing the same truth only from a different angle.

Solicitors for appellant: *Evill & Coleman.*

Solicitors for respondent: *A. J. Adams & Adams, for Coulter Hancock & Co., Truro.*

W. L. L. B.

MARTHEWS *v.* MARTHEWS.

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June 14; *Oct.* 20; *Nov.* 8.

Divorce—Husband's petition for judicial separation—Petition withdrawn and in same month husband's petition for divorce filed on ground of desertion—Effect of first petition on alleged desertion—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*), *as amended by Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2.

A husband, in February, 1937, presented a petition for judicial separation on the ground of desertion and, without taking any further steps, had it dismissed in January, 1938. Immediately afterwards he petitioned for divorce on the ground of desertion for at least three years immediately preceding the petition, in pursuance of s. 2 of the Matrimonial Causes Act, 1937:—

Held, that the wife's desertion which had begun in October, 1934, ceased on the presentation of the first petition in 1937, inasmuch as, on the presentation of a petition for divorce or judicial separation, there is a temporary and quite considerable change in the duties appertaining to the marriage state and at least an interregnum is created in the running of the period of desertion.

Stevenson v. *Stevenson* [1911] P. 191 followed.

HUSBAND'S UNDEFENDED PETITION for divorce on the ground of desertion.

Mr. Eric Walter Marthews, a dental surgeon, was married on July 2, 1927, at Twickenham parish church, to Mrs. Linda Rose Marthews. Mr. Marthews in February, 1937, presented a petition for judicial separation on the ground of desertion without cause for two years and upwards. He did not pursue the petition and on his application it was dismissed in January, 1938. He filed a second petition on January 27, 1938, this time praying for divorce on the ground of his wife's desertion without cause for a period of at least three years immediately preceding the presentation of the second petition.

The judge found that the wife had deserted the husband in October, 1934, and adjourned the case for argument on a point of law arising from the Court of Appeal's decision in *Stevenson* v. *Stevenson* (1), whereby it was adjudged that the filing of a petition for judicial separation prevented desertion from running during the pendency of the suit.

(1) [1911] P. 191.

R. J. A. Temple for the petitioner.

John Latey (with him *B. L. A. O'Malley*) for the respondent.

Cur. adv. vult.

1938. Nov. 8. LANGTON J. delivered a considered judgment as follows :—

At the hearing of the matter upon June 14 the petitioner proved to be a nervous and confused witness, and even in the able hands of Mr. Theodore Turner, who then represented him, he did not succeed in convincing me that desertion had really taken place. There was also looming in the background a legal difficulty arising out of the presentation of a petition for judicial separation in February, 1937, before a period of three years had elapsed from the date of the alleged desertion. In the circumstances Mr. Turner wisely elected to ask for an adjournment, in the hope that the facts as to desertion might be further elucidated, and the legal difficulty to which I have referred further considered.

On October 20 the matter came before me again, when the petitioner was represented by Mr. Temple, and with the help of some correspondence which had been unearthed since the first hearing, the petitioner succeeded in convincing me entirely as to the fact of his wife's desertion in the month of October, 1934. Since the petition in the present case was presented on January 27, 1938, I should accordingly have had no difficulty in finding desertion proved for the period required under s. 2 (*b*) of the Matrimonial Causes Act, 1937, were it not for the legal difficulty created by the presentation of the petition for judicial separation in February, 1937. This case accordingly raises under the new Act precisely the same point as was dealt with by the Court of Appeal under the Matrimonial Causes Act, 1857, in the case of *Stevenson* v. *Stevenson.* (1)

After a considerable and difficult inquiry it became quite clear that Mr. Marthews in this case was the victim of some very foolish advice on the part of a solicitor's managing clerk in the employ of a solicitor who was at that time, but is no

(1) [1911] P. 191.

longer, acting as legal adviser to the petitioner. Mr. Marthews, whose wife had left him and refused to return, consulted this managing clerk as to how he might best act to bring his wife to reason or to obtain a divorce. For motives that remain entirely obscure to me, the managing clerk suggested that his best course would be to put a petition for judicial separation on the file as the best means of what he described as "bringing "matters to a head." It will be remembered that at that time the new Matrimonial Causes Act was not in force, and was not even certain of being passed into law. What matters could thus be brought to a head, or to any satisfactory conclusion, by a petition for judicial separation in these circumstances it is beyond my powers to imagine.

Nevertheless, the step was taken, and the respondent filed an answer to the effect that a deed of separation, dated July 18, 1933, was still subsisting. In truth and in fact, this deed of separation, as the respondent well knew, had come to an end upon a resumption of cohabitation, and at no time either before or after the suit for judicial separation was commenced has the respondent had sufficient confidence in this answer to make any claim for the support to which she would have been entitled under the deed. Indeed, so tenuous is her belief in this answer that she never troubled to re-assert it when the present petition for divorce was put forward in January, 1938. No further step was ever taken by either party in the petition for judicial separation, and the petition itself was withdrawn by the petitioner upon advice, and was dismissed at his instance by this Court on January 26, 1938.

No one who has the interests of justice at heart can see with equanimity a litigant being penalized as the result of bad legal advice. I am therefore not ashamed to confess that I have aided and abetted Mr. Temple in his praiseworthy effort to find a loophole out of the legal impasse into which the petitioner has forced himself.

In the case of *Stevenson* v. *Stevenson* (1) a strong Court of Appeal, presided over by the Master of the Rolls, Sir H. H. Cozens-Hardy, laid down that the institution of a suit

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(1) [1911] P. 191.

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for judicial separation precluded the petitioner from successfully pleading that the period for desertion was running during the time that the suit was being maintained. The suit in that case was a wife's petition for divorce on the ground of the husband's adultery and desertion. It was only necessary at that time to prove, so far as desertion was concerned, a desertion of two years. In fact, at the time when the divorce petition was presented, the desertion had run for upwards of three years, but unfortunately that period of three years was interrupted by an earlier petition for judicial separation which had been presented half-way through the period of three years, on the ground of the husband's adultery.

The Master of the Rolls, in giving the judgment of the Court of Appeal, affirming the decision of the trial judge, Bargrave Deane J., used the following language (1): " In my "opinion this decision was perfectly right. At the date "of the petition there had not been desertion for two years, "such as is required by the statute. The desertion had "lasted eighteen months only. The presentation of the "petition and its continuance on the files of the Court "prevented the subsequent desertion from being without "excuse. She was praying the Court to require her husband "to keep away. When the supplemental petition was filed "there had not been desertion for two years without excuse."

In his argument Mr. Temple took four points, three of which seem to me to be worthy of consideration. His first point, which appeared to me to be quite unarguable, was really founded upon the head-note to the case of *Stevenson* v. *Stevenson*. (1) It had no foundation in and received no support from anything to be found in the judgments delivered in the case. Because no further step was taken after the wife's answer had been delivered in the suit for judicial separation, Mr. Temple attempted to argue that the suit had not been " filed and prosecuted." The short answer to this contention, if any be necessary, is to be found at once in the passage which I have quoted above from the judgment of the Master of the Rolls. So long as that petition remained on the file Mr. Marthews "was praying the Court to require his wife to keep away."

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(1) [1911] P. 191, 194.

The points of substance were, first, that the existence of such a suit was evidence only of a desire that the wife should keep away, and could be rebutted by the other evidence in the case. Secondly, that whereas the Court in *Stevenson* v. *Stevenson* (1), were dealing with the Act of 1857, where the words employed are "without excuse," the words in the Act of 1937 are "without cause." Thirdly, that a distinction can and ought to be founded upon what the President in the recent case of *Herod* v. *Herod* (2) has called a "subjective" rather than an "objective" construction of "desertion "without cause."

I have given all these points the closest and most partial consideration, since I have been most anxious to assist the petitioner out of his difficulty if I could feel that it was right and permissible to do so. I am sadly afraid that the more closely they are examined the more flimsy they become. As regards the first, it is true that Bargrave Deane J. in his judgment in *Stevenson* v. *Stevenson* (3) said that the prayer for judicial separation was "the strongest piece "of evidence you can have that she herself wished the "state of cohabitation to be put an end to." Also, I entirely agree with Mr. Temple that the petitioner in the present case did not read and certainly did not intend the meaning of the words contained in the prayer. If, therefore, the prayer could be treated as evidence only, there is certainly strong evidence in the present case to rebut the effect of the prayer. On the other hand, it is perfectly clear that the Master of the Rolls, while affirming Bargrave Deane J. in *Stevenson* v. *Stevenson* (1) did not put the matter upon evidence at all. He was laying down as matter of law that no one can invoke the assistance of the Court, with all that such assistance connotes, during the pendency of the petition, and at the same time claim that during the period that such

(1) [1911] P. 191.

(2) Ante, p. 11.

(3) [1911] P. 191, 192.

assistance is being invoked the other spouse is guilty of desertion.

When one bears in mind that as soon as petitions of this class, for either divorce or judicial separation, are presented to the Court, there is a temporary and quite considerable change in the duties appertaining to the marriage state, there is nothing surprising in the result that such petitions should be held to create an interregnum at least in the running of the period of desertion.

That this conception was not absent from the minds of those responsible for the present Act is, I think, clear from the wording of s. 6, sub-s. 3, of the Matrimonial Causes Act, 1937. The sub-section says: "For the purposes of any "such petition for divorce, a period of desertion immediately "preceding the institution of proceedings for a decree of "judicial separation or an order under the said Acts having "the effect of such a decree shall, if the parties have not "resumed cohabitation and the decree or order has been "continuously in force since the granting thereof, be deemed "immediately to precede the presentation of the petition for "divorce." It will be observed that in order to obtain the advantage of being able to count the period of desertion which has preceded the institution of proceedings for judicial separation, it is there made necessary that the parties shall not have resumed cohabitation, and that the decree has been continuously in force since the granting thereof. It is difficult to believe that the Legislature in considering this matter were not attempting to confirm rather than to over-ride the principle laid down in *Stevenson* v. *Stevenson*. (1)

The point made upon the words "cause" and "excuse" is quite obviously untenable when one finds the two words both used in the same signification in the Act of 1857; see also the decision in *Wickins* v. *Wickins*. (2)

Finally, the attractive point argued upon the analogy of the President's judgment in *Herod* v. *Herod* (3), that the words "desertion without cause" must be considered as

(1) [1911] P. 191.
(2) [1918] P. 265.
(3) Ante, p. 11.

used in a subjective sense can have no force in the face of the understanding of the Master of the Rolls' judgment in *Stevenson* v. *Stevenson* (1), which I have here expounded.

To my regret, therefore, I must hold that this case is ruled by the judgment of the Court of Appeal in *Stevenson* v. *Stevenson* (1), and the petition fails.

Solicitors: *J. D. Langton & Passmore; Gilbert Samuel & Co.*

W. L.

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(1) [1911] P. 191.

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Nov. 10.

WALTON *v.* WALTON.

Divorce—Wife's petition for divorce on the ground of desertion—Wife's former petition for divorce on the ground of adultery filed fourteen months previously—Refusal of registrar's certificate upheld—Matrimonial Causes Rules, 1937, *r.* 30, *sub-r.* 1.

Where a wife's petition for divorce on the ground of desertion had been preceded, fourteen months previously, by a petition by her for divorce on the ground of adultery, and the first petition had been dismissed on her application shortly before she presented the second petition, the refusal of the registrar to give a certificate for setting down the cause for trial was upheld on appeal, on the ground that in law there can be no desertion when the legal obligation upon the spouses of living together has been suspended by a previous petition presented within the three years period.

Marthews v. *Marthews*, Ante, p. 97 followed.

APPEAL Summons from refusal of Registrar to grant his certificate that pleadings were in order under Matrimonial Causes Rules, 1937, r. 30, sub-r. 1.

In March, 1937, the wife filed a petition for divorce founded on adultery, which was dismissed on her application on May 25, 1938. She presented a petition in June, 1938, for the dissolution of her marriage on the ground of desertion for at least three years immediately preceding that date.

The registrar refused to certify that the pleadings were in order, on the ground that desertion by the husband could not continue after the presentation of the previous petition, and that therefore the fresh petition was bad on the face of it.

L. B. Schapiro for the petitioner. The decision in *Stevenson* v. *Stevenson* (1) must be regarded in the light of authorities expressly approved. *Kay* v. *Kay* (2) and *Knapp* v. *Knapp* (3) are authorities for the view that desertion comes to an end only where the circumstances are such that the deserting spouse's intention to continue desertion is affected by the existence on the file of a petition for divorce: see also

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(1) [1911] P. 191.
(2) [1904] P. 382, 393, 394.
(3) (1880) 6 P. D. 10, 11.

Harriman v. *Harriman.* (1) The decision in *Herod* v. *Herod* (2) also supports the view that intention is the principal factor in desertion, and that there may be desertion without cause even though in law there is in existence at the time of the desertion something which could operate as a cause: see *Chapman* v. *Chapman.* (3) In any event it is no part of the registrar's duty to stop the petition in limine.

The appeal summons was adjourned into Court for argument.

Cur. adv. vult.

1938. Nov. 10. HENN COLLINS J. delivered his reserved judgment as follows:—

The refusal of the registrar's certificate was grounded upon the fact that the petition, which alleged desertion for three years next preceding June, 1938, when the present petition was filed, disclosed that in March, 1937, the petitioner had filed a petition founded on adultery, which had been dismissed on May 25, 1938, on the petitioner's application.

The point was ably argued on behalf of the petitioner by Mr. Schapiro. He contended that the filing of the petition in March, 1937, did not necessarily put an end to the desertion, but that the question whether it did so or not was to be decided upon the facts of the case, and not as a matter of law, and that therefore the suit should not be stopped in limine, by the refusal of a certificate.

Since the matter was argued before me judgment has been given by Langton J. in *Marthews* v. *Marthews.* (4) I can find no material distinction between that case and this. Whether the intervening petition is for judicial separation, as in *Marthews* v. *Marthews* (4), or for divorce as in this case, its effect is to suspend the legal obligation upon the spouses of living together. There can, in law, be no desertion so long as that legal obligation is in abeyance.

This result flows merely from the presence of a petition upon the file, and not from any, nor from the absence of any, reactions it may have had upon the alleged deserter, nor would it be altered by any proof of such reactions or of the absence of them. In other words, the consequence flows as a matter of law.

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(1) [1909] P. 123.
(2) Ante, p. 11.
(3) [1938] P. 93.
(4) Ante, p. 97.

In those circumstances the learned Registrar was right in dealing with it as a matter of pleading, and the appeal must be dismissed.

Solicitors: *Joynson-Hicks & Co.*

W. L.

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C. A.

1938
Nov. 21.

Divorce—Judicial separation—Petition in 1933—*Cruelty—Dismissal by consent in* 1934—*Separation deed—Construction—Cruelty charge not withdrawn, nor abandoned for future divorce proceedings—Divorce petition in* 1938—*Cruelty sole ground—Same charges—No estoppel—Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2, *para.* (*c*).

By s. 2, para. (*c*), of the Matrimonial Causes Act, 1937: "The "following section shall be substituted for section one hundred "and seventy-six of the Supreme Court of Judicature (Consolida-"tion) Act, 1925 (hereinafter called 'the principal Act'):—

"176. A petition for divorce may be presented to the High "Court (in this part of this Act referred to as 'the court') "either by the husband or the wife on the ground that the "respondent— . . . .

"(*c*) has since the celebration of the marriage treated the "petitioner with cruelty; . . . ."

In 1933 a wife petitioned for judicial separation, alleging cruelty. In 1934 a separation deed was executed before the petition had come on for hearing. The deed provided that the proceedings should be discontinued and that the wife would withdraw the petition, which, in the same year, was dismissed on her application. The deed contained no express provision that the charges of cruelty should be withdrawn.

In 1938 (the Matrimonial Causes Act, 1937, being in force), she petitioned for divorce, on the ground only of cruelty; and the petition repeated the allegations in the petition for judicial separation, with one further paragraph. An application by the husband to dismiss the petition, on the ground that she could not base any proceedings in the Divorce Court on those allegations, was dismissed by Henn Collins J.:—

Held, by the Court of Appeal, affirming the decision of Henn Collins J., that, on the true construction of the separation deed, the wife had not undertaken either to withdraw the charges made in the petition for judicial separation, or not to use them in subsequent divorce proceedings, and that she could therefore so use them.

H. v. *H.* [1938] W. N. 273 and *Rowley* v. *Rowley* (1866) L. R. 1 H. L. Sc. 63 considered and distinguished.

APPEAL from order of Henn Collins J. dismissing the application of the husband, the respondent in divorce proceedings, for dismissal of the wife's petition for divorce.

The parties were married in 1928. On October 31, 1933, the wife petitioned for judicial separation, alleging cruelty. On January 19, 1934, before the petition had come on for

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hearing, the parties entered into a separation deed, under which the petition was to be dismissed. Clause 1 of the deed provided that they should live separate, and that neither would proceed against the other for restitution of conjugal rights, or molest, annoy, or interfere with the other; clause 2, that the husband should pay the wife a sum for debts for necessaries incurred by her and her costs incidental to the petition, " which proceedings are to be discontinued as herein-"after mentioned"; clause 3, that he should pay her a weekly sum subject to her observing the deed's conditions; clause 7, that the deed should become void should the parties be reconciled or the marriage dissolved; and clause 8 was " the said "Dessa Goldblum will forthwith and before the second day of "February next withdraw the said petition for judicial "separation."

On January 22, 1934, pursuant to the deed's provisions, the wife took out a summons asking that the petition be dismissed, and on January 24, 1934, the petition was dismissed.

On January 1, 1937, the Matrimonial Causes Act, 1937, came into force, s. 2 of which, for the first time, made cruelty since the marriage a ground for divorce. On May 26, 1938, the wife presented a petition for divorce, based only on cruelty, and repeating in terms, with one added paragraph, the allegations of the earlier petition. By a summons dated August 3, 1938, the husband applied to have it dismissed, on the ground that she was precluded by the events of January, 1934, from basing any further proceedings in the Divorce Court, and particularly the present proceedings for divorce, on those allegations of cruelty. Henn Collins J. dismissed the application.

The husband appealed.

J. W. Morris K.C. and *S. E. Karminski* for the husband, as appellant. The point raised is whether, where a wife has actually brought a petition for judicial separation (as the wife in the present case did in 1933) alleging cruelty, and the petition is dismissed by consent, and the parties have agreed to enter, and have entered, into a separation deed, the wife can, at a later period, petition for dissolution of marriage, making the same allegations as she made in the earlier petition.

If a charge is dismissed by consent, that does amount to a dismissal of the charges in the action. In the Divorce Division there is a practice, similar to that in the King's Bench Division, for permitting discontinuance in that way. In the King's Bench Division, if an action is dismissed by consent, that is a dismissal of all charges.

In the present case the Court would not allow the wife to revive, if she wished to do so, the petition of 1933, because she had made an arrangement with the husband, allowed the petition to be dismissed, and appeared before the Court and consented to the dismissal. That is an estoppel by record. In those circumstances, it does not matter that the precise words " withdrawal of the charges " are not used : see *H.* v. *H.* (1) If it is right that a dismissal by consent must involve a dismissal and withdrawal of the charges, the decision in that case enables the husband in the present case to succeed. Also, if it is right that, apart from any change in the law, the wife would not have been allowed to present, after 1933, the same petition as she presented in 1933, it cannot be said that any difference has been made by the alteration in the law : see *Rowley* v. *Rowley* (2) and *Hall* v. *Hall and Richardson.* (3) The latter case, to some extent, deals with the general procedure in the Divorce Division : see also *In re South American and Mexican Co.* (4) and Halsbury's Laws of England, 7th ed., vol. 10, p. 745, para. 1159.

Gilbert Beyfus K.C. and *Henry H. Harris* for the wife as respondent. It is true that it was agreed that the proceedings should be discontinued and the petition for judicial separation withdrawn. The deed does not, however, contain any undertaking by the wife either to withdraw the charges that she had made in that petition or not to use them in later divorce proceedings : and it is quite impossible for the Court to hold that the withdrawal of the petition and discontinuance of the proceedings involve also a withdrawal of the charges. Nothing was in fact said in the separation deed about withdrawal of the charges, or about undertaking not to use them again. *H.* v. *H.* (1), so far from being in the husband's favour, is against him: for there there was provision that all charges of cruelty should be withdrawn, and Sir Boyd Merriman P. held that they could not be used again in divorce proceedings. In *Rowley* v. *Rowley* (2) the wife did, in an agreement, undertake not to institute other proceedings in the Divorce Court: and Lord Chelmsford L.C. said that the words used seemed to have been intended to prevent future proceedings in respect of matters forming the ground of a petition for a divorce which had occurred prior to the agreement.

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(1) [1938] W. N. 273.
(2) L. R. 1 H. L. Sc. 63.
(3) (1879) 48 L. J. (P.) 57.
(4) [1895] 1 Ch. 37.

In the present case there are in the separation deed no words of any sort or kind which can be construed into an undertaking of that nature on the wife's part. Such an undertaking could have been put into the deed, but it was not; and the husband cannot ask the Court to read it into the deed.

SIR WILFRID GREENE M.R. This is an appeal from an order of Henn Collins J., whereby he dismissed an application by the husband, the respondent in divorce proceedings, asking for dismissal of the petition.

The point raised is one of some general importance. The parties were married in the year 1928, and on October 31, 1933, the wife, who is the petitioner in the present divorce proceedings, presented a petition for judicial separation. That petition contained certain allegations of cruelty. On January 19, 1934, before that petition had come on for hearing, the parties entered into a separation deed under which the petition was to be dismissed. I will come back to the terms of that deed in a moment. On January 22, 1934, pursuant to the provisions in the deed, the wife took out a summons asking for the petition to be dismissed, and an order to that effect was made on January 24, 1934. The order is as follows: "Upon hearing the solicitors for the parties and by

(1) [1938] W. N. 273.

(2) L. R. 1 H. L. Sc. 63.

"consent I do order that the petition filed herein on the "first day of November, 1933, be dismissed." On January 1, 1938, the Matrimonial Causes Act, 1937, came into force, and by s. 2 of that Act for the first time cruelty since the celebration of the marriage was made a ground for the presentation of a petition for divorce. On May 26, 1938, the wife presented the petition which is the subject-matter of the present application. That petition was based on the ground, and on the ground alone, of cruelty, and in it she repeats in terms the allegations of cruelty made in the earlier petition together with one added paragraph. The object of the husband's application was to obtain the dismissal of that petition upon the ground that the wife was precluded by what had happened in January, 1934, from making those allegations of cruelty a basis for the presentation of any further proceedings in the Divorce Court and in particular the present proceedings for divorce. Henn Collins J., as I have said, dismissed the husband's application and this appeal results.

It is not suggested by Mr. Morris, on behalf of the husband, that the mere dismissal by consent of the petition for judicial separation was by itself sufficient to prevent the charges of cruelty made in that petition being relied upon in the present proceedings. If authority were required for that view (which Mr. Morris accepted) it is to be found in the case of *Hall* v. *Hall and Richardson* (1), a decision of Sir James Hannen P. But it is said in the present case that there is something more than a mere dismissal by consent and that the contract which the parties entered into, namely, the separation deed of January 19, 1934, on its true construction has the effect of preventing the wife relying upon those charges. The matter, in my judgment, depends upon the true meaning and effect of that document and it is necessary to examine its terms. It recites unhappy differences, by reason whereof the parties have agreed to live separate and to enter into the arrangement thereinafter expressed. Then it witnesses by clause 1 that the parties shall live separate and that neither one will take

(1) 48 L. J. (P.) 57.

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proceedings against the other for restitution of conjugal rights, or molest, annoy or interfere with the other. In clause 2 the husband agrees to pay to the wife a sum of money to provide for debts for necessaries incurred by her and her costs incidental to the petition; and then it says: "which proceedings are to be discontinued as hereinafter "mentioned." It is to be noticed that the word "discontinued" there is not accurate, for such proceedings cannot be discontinued. Then, under clause 3, subject to the wife's observing the conditions of the deed, the husband agrees to pay her a weekly sum. Then there are certain other provisions to which I need not refer. Clause 7 provides for the deed becoming void if the parties should become reconciled or if their marriage should be dissolved. Clause 8 is in the following terms: "The said Dessa Goldblum will "forthwith and before the second day of February next "withdraw the said petition for judicial separation." The phrase "withdraw the said petition" is, again, inaccurate. because petitions cannot be withdrawn: nevertheless both the phrases "proceedings are to be discontinued" and "withdraw the said petition" mean, in my opinion, nothing more than that the petition will be got rid of by proper procedure in the Divorce Court, which is dismissal by consent. The parties, therefore, are agreeing that the petition shall be dismissed by consent. Pursuant to that they came before the registrar by their solicitors and acknowledged their consent, and the order which I have mentioned was made. It is perfectly clear to my mind that in this document there is no express undertaking by the wife to withdraw any of the charges that she had made, nor is there any undertaking by her not to make those charges the foundation of future proceedings of some kind in the Divorce Court. To what extent, if at all, the agreement might have prevented her from taking proceedings for judicial separation based on precisely the same allegations it is not necessary now to inquire. The question with which we are concerned is whether the true effect of that document when properly construed is to preclude her from taking the present proceedings for divorce and, in support of those proceedings, alleging the same acts of cruelty. As I have said, there is no express term to that effect, but Mr. Morris says that the phrases "proceedings "are to be discontinued" and "withdraw the said petition" are equivalent to the withdrawal of the charges made in the petition. As a matter of construction of the deed, I am quite unable to take that view. There are two quite different things. The obtaining of a dismissal of a petition by consent is a thing which, in the divorce practice, does not, as I have pointed out, by itself produce the sort of estoppel which is desired. There is all the difference in the world between that and withdrawing charges or agreeing not to bring further proceedings in the Divorce Court. Provisions in separation deeds of the latter character are well known and there have been many decisions dealing with them: but the present document is completely silent upon any such matter and I am unable to extract from the phraseology used any withdrawal or undertaking of the kind.

Mr. Morris, for the appellant, relied upon certain authorities and in particular a decision of Sir Boyd Merriman P. in *H.* v. *H.* (1) That authority, when properly understood, is, in my opinion, against the appellant, and not in his favour. It was a case where the wife, in 1929, presented a petition for judicial separation alleging cruelty. The petition was compromised on the terms, among others, that all charges of cruelty were withdrawn, that a deed of separation was to be drawn up between the parties and in the meanwhile pending the execution of such a deed the cause was to be placed in the Reserve List. The terms were made part of the order of the Court. The wife, after the coming into force of the Act of 1937, presented a petition for divorce charging the same cruelty as that alleged in the former petition. It was held by the learned president that that petition was barred by the deed. The important matter to observe is the reasons why the learned president so held. First of all, it is to be noted that there was not in that case any formal order, as in the present case, dismissing the petition by consent, but the absence of such an order was treated (and, if I may say so, quite rightly treated) by the learned President as being a mere matter of form. He regarded the getting rid of the petition by an actual formal order as a matter which really did not affect the substance of the question: had he done otherwise he would have treated the absence of that order as being in some way a crucial matter in the case, but he did not do so. The point that he went on to examine—and it is, in my judgment, the same point as that which arises in this case—was the true construction of the deed. The deed there in terms provided that all charges of cruelty were withdrawn, and in face of that the learned president held that it was quite impossible to rely on those charges in some subsequent proceedings in the Divorce Court, although those subsequent proceedings were not of the same nature. He referred to several previous authorities and he pointed out that the words " shall not institute proceedings in the Divorce Court " (which is one of the forms found in one of the cases to which he referred) and " withdrawal of charges " meant the same thing. On that construction it was obviously impossible for the petition in that case to be supported. The other authority referred to was *Rowley* v. *Rowley*. (1) That, again, was a case where the wife had endeavoured to obtain a decree of divorce a mensa et thoro on the ground of cruelty and adultery, but she ultimately failed in those proceedings. Subsequently, after the establishment of the Divorce Court, she presented a petition in that Court praying for dissolution on the ground of cruelty and adultery, and it contained several charges of cruelty. Before that petition was adjudicated upon, and after apparently the trial had got some little way, the parties came to an agreement and they signed a document under which a juror was to be withdrawn and the petitioner was to move at the proper time to have the petition taken off the file, the respondent consenting to the application: there was an undertaking by the respondent to execute a deed of separation; and then it ended up with these words "The petitioner undertaking not to institute other proceedings

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(1) [1938] W. N. 273.

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(1) L. R. 1 H. L. Sc. 63.

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"in the Divorce Court." The lady subsequently in the teeth of that agreement endeavoured to get her petition on for hearing again and in that effort she failed after having carried the matter to the full Court. The position, therefore, in that case again, as in the case of *H.* v. *H.* (1), was that, although the parties had agreed that the petition should be formally disposed of, that actual step had never been taken, but the Court had refused to allow her to proceed with the petition. There again for all substantial purposes the petition had been got rid of pursuant to the agreement. Afterwards she presented a fresh petition in the Divorce Court praying for dissolution of her marriage by reason, as she alleged, of her husband's adultery and cruelty. This petition contained paragraphs charging the same acts of cruelty as were alleged in her original petition, but it also charged further acts of adultery which had come to her knowledge. The other paragraphs charged acts of cruelty identical to those alleged in her original petition. Accordingly, as at that date it was necessary to establish cruelty before she could obtain a divorce it was necessary for her to be able to establish those acts of cruelty. The question was whether in view of her agreement she was entitled to rely upon them. Lord Chelmsford L.C. says (2): "My Lords, the whole question, "in this case, turns upon the meaning of the words in the "agreement: 'The Petitioner undertaking not to institute "'other proceedings in the Divorce Court.' It appears to "me to be difficult to apply any other than one meaning "to these words. It is not contended that they amount "to an undertaking never to institute any other proceedings. "But they seem to have been intended to prevent future "proceedings in respect of matters forming the ground of a "Petition for a divorce which had occurred prior to the "agreement." On that construction of the document the answer was perfectly clear. The important point in that case is that the matter was decided not on the ground that the petition ought to have been dismissed by a formal order or that any such formal order would have produced any different

(1) [1938] W. N. 273. (2) L. R. 1 H. L. Sc. 63, 67.

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result, but upon the exact language that the parties used in the agreement—language which in that case was wide enough to preclude the wife from instituting those proceedings. In the present case such language is entirely absent. I am not prepared, and I do not think the Court would be entitled, to read into this document words which are not to be found in it. The insertion of words of that kind in these deeds is a common matter and the parties in this case have left them out.

That being so, the consequence must follow that Mr. Morris, in my judgment, fails to establish what it is necessary for him to establish, namely, that the deed of separation coupled with the formal order for dismissal is sufficient to produce the result claimed. As I have said, the mere existence of that formal order for dismissal does not, in my judgment, really strengthen the case in any way. The position would have been the same in any case and the arguments would have, or should have, been precisely the same if the formal step of obtaining that particular order pursuant to the agreement had never in fact been taken, as it was not taken in *H.* v. *H.* (1) and *Rowley* v. *Rowley*. (2) In the result the appeal is dismissed and dismissed with costs.

SCOTT L.J. I agree and have nothing to add.

CLAUSON L.J. I agree.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker; Bennett, Bennett & Rabin.*

K. R. A. H.

(1) [1938] W. N. 273.

(2) L. R. 1 H. L. Sc. 63.

PRATT *v.* PRATT.

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Dec. 15.

Divorce — Desertion — " Without cause " — Termination — Request by deserting spouse for interview to discuss resumption of cohabitation —Refusal by innocent spouse—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2.

The respondent deserted her husband in August, 1934. In September, 1936, she wrote to him asking him to see her with a view to discussing a resumption of cohabitation. He refused to do so:—

Held, that after this refusal by the husband the respondent could not be said to continue to desert him " without cause " within the meaning of s. 2 of the Matrimonial Causes Act, 1937.

APPEAL from Finlay J. at Winchester Assizes.

The petitioner, Francis James Ellis Pratt, and the respondent, Eileen Mary Drummond Pratt, were married on September 14, 1933. On August 11, 1934, the wife left the husband in circumstances which amounted to desertion of him by her, and after that date the parties lived apart.

On September 23, 1936, the wife wrote to her husband a letter in which she said: "I am writing to say that I should "like to see you and am thinking about coming over one "day next week. Which day suits you best? I suppose "Wednesday? Do not imagine I am coming in a hostile "spirit. I wish to meet you perfectly agreeably and I trust "you will do the same. I wish to have a talk with you, but "I am anxious for it to be a perfectly pleasant one. . . . . "I have a nice house here and lovely garden, and you are always "quite welcome if you care to come." On September 24 the husband replied: "I am in receipt of your letter of the "23rd inst. . . . . I do not think an interview will serve "any useful purpose."

On September 25 the wife wrote a further letter, in which she said: "I am feeling that, as we are still married, it "will be best if we can come together, as it is undoubtedly "the only course. My idea in coming to see you was to "discuss this and suggest that we should meet occasionally "and go out together, in short, make a new start, with a

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"view to making a home together in the future. I should "like you to come and see me, and have no wish for further "hostilities or bitterness, which do neither of us any good. "Therefore, I am sure you will see that it is essential we "meet and that the future shall be arranged between us as "agreeably as possible. Anything you have to say as regards "this, or suggestions you may make, I shall be pleased to "consider. Any day or time, bar Tuesday, will suit me next "week." On September 27 the husband replied: "I can "only repeat what I said in my letter to you of the 24th inst., "namely, that I do NOT consider an interview would serve "any useful purpose."

On January 1, 1938, the husband filed a petition for the dissolution of his marriage under s. 2 of the Matrimonial Causes Act, 1937 (1), on the ground that his wife had deserted him without cause for a period of at least three years immediately preceding the presentation of the petition.

When the petition, which was undefended, came before Finlay J., at Winchester Assizes, he held that from the moment when the husband refused to meet the wife and discuss a resumption of cohabitation, the wife could not be said to desert him "without cause" within the meaning of the section, and he, therefore, dismissed the petition.

The husband appealed.

Middleton K.C. and *Scott Henderson* for the appellant. The decision of Finlay J. was wrong. Undeniably there was desertion of the husband by the wife from August, 1934, to September, 1936, and once desertion has begun it continues until there is a genuine repentance and a sincere and reasonable attempt to terminate it: *Bowron* v. *Bowron*, per Scrutton L.J. (2) The burden of proving those matters is on the deserting party and that burden has not been discharged

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(1) By Matrimonial Causes Act, 1937, s. 2: "A petition for divorce "may be presented to the High "Court . . . . either by the "husband or the wife on the "ground that the respondent— ". . . . (*b*) has deserted the "petitioner without cause for a "period of at least three years "immediately preceding the presentation of the petition; . . . ."

(2) [1925] P. 187, 195.

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by the wife in the present case. It may be discharged by evidence of a genuine offer to resume cohabitation, but here there is nothing more than an offer to negotiate, involving perhaps the imposition of conditions on the resumption of cohabitation, and the husband might reasonably entertain doubts regarding its genuineness. The desertion was not, therefore, obliterated: *Thomas* v. *Thomas*. (1) Circumstances much more cogent than a mere request for an interview, namely, intermittent visits paid by the deserting spouse to the other spouse, have been held not to prevent a continuance of desertion: *Thurston* v. *Thurston* (2), and that even though the visits are accompanied by marital intercourse: *Garcia* v. *Garcia*. (3) The fact that the husband in the present case may have desired the continued absence of his wife does not prevent the continuance of her desertion of him: *Harriman* v. *Harriman* (4), per Buckley L.J.

The respondent did not appear.

SCOTT L.J. It is quite clear that there was desertion of the husband by the wife from August, 1934, until September, 1936. During that period the wife repeatedly wrote letters saying that she would not on any account resume cohabitation with her husband. [His Lordship read the letters of September 23, 24, 25 and 27 and continued:] Finlay J., however, held that after that later correspondence had passed between the parties it was impossible to say that there was desertion by the wife without cause. This Court has to decide whether or not he was right in that conclusion.

We have considered the cases which have been cited to us and we do not think that they demonstrate any principle of law which is applicable to the question we have to decide. That question is whether or not the husband can say that his wife still deserted him without cause after he had refused even to see her and discuss their relations with her. In my view, it is impossible to say that the decision of Finlay J. on that matter was wrong.

(1) [1924] P. 194.
(2) (1910) 26 Times L.R. 388.
(3) (1888) 13 P. D. 216.
(4) [1909] P. 123, 148.

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When two married persons are living apart in circumstances which constitute desertion of the one by the other and the guilty party writes to the other and asks for an interview to discuss the position, there is a duty on the party receiving that request at least to see the other spouse and give him or her an opportunity of saying what he or she wishes to say.

In my opinion Finlay J. was right and this appeal should be dismissed.

MACKINNON L.J. I agree.

DU PARCQ L.J. I agree.

Appeal dismissed.

Solicitors for appellant: *Peacock & Goddard, for Traill, Castleman-Smith and Wilson, Blandford.*

G. F. L. B.

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Dec. 2, 12.

Shipping—Bill of lading—Damages—Short delivery of timber—Delivery of timber not covered by bills of lading—Shipowners' claim to be credited with value of over-delivered timber.

In defence to the shipowners' claim for balance of freight, the defendants, who were the holders of twelve bills of lading under which they took delivery of a part cargo of sawn timber, counterclaimed for short delivery of 286 pieces of timber under four of the bills of lading.

By way of defence to this counterclaim the shipowners claimed to be entitled to the value of 362 pieces of timber received from them by the defendants and not covered by any of the bills of lading. There was no evidence as to whether the defendants had paid the vendors of these pieces. The county court judge held that the defendants must give credit to the plaintiffs for the value of the pieces, described in the pleadings as "over-delivered." The defendants appealed :—

Held, that as between shipowners and consignees there was no reason for holding either by implication of law or by way of inference from the facts that the acceptance by the consignees of the overplus by itself gave the shipowners a right to anything more than the payment of additional freight ; that even this right would appear to depend not on an implication of law but on an inference to be drawn from the particular facts ; and that there were no facts before the Court to support a finding that the defendants were bound by contract to pay to the plaintiffs the value of the overplus.

Dictum of Romer L. J. in *Mediterranean & New York Steamship Co.* v. *A. F. & D. Mackay* [1903] 1 K. B. 297, 305, as to an obligation to give credit to the shipowner in a case of over-delivery, disapproved.

APPEAL by the defendants from a decision of the county court judge sitting at Kingston-upon-Hull.

The plaintiffs were the owners of the steamship *Nordborg ;* the defendants were the holders of twelve bills of lading, dated August 14–17, 1933, under which they accepted delivery of a part cargo of sawn timber carried on the *Nordborg* from Leningrad to Hull. The plaintiffs claimed 12*l.* 12*s.* 9*d.*, being 444*l.* 8*s.* 2*d.* freight less 425*l.* 5*s.* 6*d.* paid on account.

The defendants admitted the claim subject to a counter-

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claim for 286 pieces of timber short-delivered. By their reply and defence to counterclaim the plaintiffs admitted the shortage, but pleaded that the defendants received 362 pieces of wood not covered by any of the bills of lading and had accepted them "in satisfaction or on account" of the plaintiffs' obligation to deliver to the defendants the number of pieces set out in the respective bills of lading. Alternatively the plaintiffs said they were "entitled to credit for the value of "the 362 pieces . . . . against the counterclaim of the "defendants." Further, and in the alternative, it was alleged that the plaintiffs received all the pieces of wood loaded on board the *Nordborg* as carriers and bailees and were entitled to possession thereof, and that the defendants were not entitled to possession of any pieces of wood not covered by one or other of the bills of lading. "The 362 pieces of wood "were delivered to the defendants by mistake," but the defendants had refused to deliver them to the plaintiffs and wrongly detained them from the plaintiffs, and "converted "the same to their own use." In the premises the plaintiffs claimed the return of the 362 pieces or their value. In the further alternative the plaintiffs claimed to set off the value of so much of the 362 pieces as would meet the defendants' counterclaim, together with the return of the balance of the 362 pieces or its value.

The county court judge in the course of his judgment said that in *The Estland* (1) he had held that, when a consignee accepted under a bill of lading more pieces of timber than were specified in that bill, the consignee must give credit to the shipowner. In coming to that conclusion he (the judge) had followed a dictum of Romer L.J. in *Mediterranean & New York Steamship Co.* v. *A. F. & D. Mackay* (2), and he thought that the facts in the present case were not distinguishable and that the *Mediterranean* case (2) governed both. He therefore gave judgment for the plaintiffs for a sum to be assessed as the value of the over-delivered timber.

The defendants appealed. The appeal was heard on December 2, 1938.

(1) (1935) 54 Ll. L. R. 98.

(2) [1903] 1 K. B. 297, 305.

F. A. Sellers K.C. and *A. A. Mocatta* for the appellants. Each of the bills of lading constitutes a separate contract, and the consignees had the right to claim shortage under each of them.

The dictum of Romer L.J. in *Mediterranean & New York Steamship Co.* v. *A. F. & D. Mackay* (1), on which the county court judge based his decision, is obiter. In that case the judgment of Bucknill J. was in favour of the consignees on their counterclaim for short-delivery, and the decision in the Court of Appeal did not turn on whether credit had been given for over-delivery of goods of another sort. Doubt was thrown on the correctness of the dictum or the accuracy of the reports by Goddard J. in *Lauro* v. *L. Dreyfus & Co.* (2) and, it is submitted, there is no legal basis for any such credit being given. The *Mediterranean* case (1) is also distinguishable, for there was only one bill of lading in that case. The pieces of timber in the present case, shipped under a number of bills, were never identified, and there was no evidence that the consignees were not entitled to this surplus. It was for the plaintiffs to prove that the defendants had no title to the 362 pieces, and they did not prove anything at all. The intake may have been erroneous and the outturn correct. The shipowners' rights and liabilities ended on delivery, and their real cause of action, if any, has not been considered. The principle of-set off for which they contend is wholly without foundation.

Owen L. Bateson (*Sir Robert Aske K.C.* with him) for the respondents. The carrier who delivers the wrong goods is entitled to recover them from the consignee or to have their value. That principle was affirmed by Romer L.J. in *Mediterranean & New York Steamship Co.* v. *A. F. & D. Mackay* (3), who said further that the consignees in that case had complied with it: see the report in the Law Journal. (4) The shipowners in the present case could have sued in detinue or conversion: see *Van Oppen & Co., Ld.* v. *Tredegars, Ld.* (5),

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(1) [1903] 1 K. B. 297, 305; 72 J. (K. B.) 147.

(2) (1937) 59 Ll. L. R. 110, 116, 117.

(3) [1903] 1 K. B. 297, 305.

(4) 72 L. J. (K. B.) 147, 150.

(5) (1921) 37 Times L. R. 504.

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and *Lancashire & Yorkshire Ry. Co.* v. *MacNicoll.* (1) Their rights were not extinguished on delivery; they were entitled to payment, just as the buyer who accepts a larger quantity of goods than he has contracted for must pay for them: see s. 30, sub-s. 2, of the Sale of Goods Act, 1893. The shipowners intended to offer the right quantity and by mistake gave the consignees more. The pieces of timber were probably mixed up.

[SCOTT L.J. referred to *Spence* v. *Union Marine Insurance Co.* (2)]

If under these circumstances the consignees keep the goods, by implication of law they must pay for them, i.e., they must give credit to the shipowners: see *Brown* v. *Hodgson* (3) and the observations of Lord Moulton in *Sandeman & Sons* v. *Tyzack & Branfoot Steamship Co.* (4)

Sellers K.C. replied.

Cur. adv. vult.

1938. Dec. 12. The judgment of the Court (Scott, MacKinnon and du Parcq L.JJ.) was read by

DU PARCQ L.J. This is the defendants' appeal from a judgment of the Kingston-upon-Hull County Court. The defendants were the holders of twelve bills of lading bearing various dates in August, 1933, under which they took delivery of a part cargo of sawn timber borne in the plaintiffs' vessel from Leningrad to Hull. To a claim for freight amounting to 19*l.* 12*s.* 9*d.* the defendants, while admitting the claim, counterclaimed damages on the ground of short delivery on four of the bills of lading. It was provided in each of the bills of lading that "all the terms conditions clauses and "exceptions contained in the charterparty were deemed to be "incorporated therein," and by clause 10 of the charterparty the owner was to be responsible for the number of pieces signed for by the master or his duly authorized agents. Possibly because of the operation of this clause the plaintiffs were constrained to admit in their reply that "they failed to

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(1) (1918) 118 L. T. 596.
(2) (1868) L. R. 3 C. P. 427.
(3) (1811) 4 Taunt. 189.
(4) [1913] A. C. 680, 696.

"deliver certain pieces of wood to the defendants as claimed "in the counterclaim." By way of defence to the counterclaim, however, they sought to rely on the fact that a quantity of timber amounting to 362 pieces had been received from them by the defendants which was not covered by any of the twelve bills of lading. By their pleading they made alternative and inconsistent allegations, as, of course, they were entitled to do. First, they said that the defendants had accepted the quantity over-delivered "in satisfaction or on account of" the plaintiffs' "obligation to deliver the number of pieces set out "in the respective bills of lading." Alternatively, they said that this timber had been delivered to the defendants "by mistake" and that the defendants had refused to deliver it up to the plaintiffs and wrongfully detained it. They claimed to be entitled to be credited with the value of the 362 pieces, or to have the 362 pieces returned or their value paid to them.

At the trial the bills of lading were put in evidence. There was no other evidence, written or oral. Each party relied on the admissions in the other party's pleadings. The plaintiffs for their part further relied on certain admissions obtained from the defendants in response to a notice to admit facts. These admissions, so far as it is necessary to set them out, were as follows: (1.) That 362 pieces of wood over and above the number shown in seven specified bills of lading were discharged to and received by the defendants from the vessel on the said bills of lading and that they were of the quality described in such bills of lading; (2.) that the value of the said 362 pieces calculated on the average of the respective bills of lading exceeded the value of the admitted shortage of 286 pieces of wood calculated on the same basis.

The question which we have to decide is whether, on the admitted facts, the learned judge was justified in holding that the defendants must give credit to the plaintiffs for the value of the 362 pieces described as "over-delivered."

It was conceded by counsel for the plaintiffs that, upon these facts, he could not ask the Court to find that the defendants had accepted the 362 pieces "in satisfaction or on "account of" the plaintiffs' obligation to deliver the number of pieces set out in the bills of lading. He contended, however, that the proper inference from the facts was that the plaintiffs had established their alternative allegation and that the defendants were liable to them as tortfeasors in detinue or conversion. In support of this contention counsel referred us to the decision of a Divisional Court in *Lancashire & Yorkshire Ry. Co.* v. *MacNicoll.* (1) In that case it was not in dispute that the consignees had received from the carriers goods which were the property of another and to the possession of which they had no right. In the present case, as was pointed out by counsel for the defendants, it is consistent with the facts admitted that, as between themselves and their vendors, the defendants were contractually bound (or at least entitled) to accept and to pay the vendors for the 362 pieces, and that they were in truth themselves the owners of the timber described as "over-delivered". The figures in the bills of lading, though conclusive evidence against the shipowners, may be erroneous, and it may be that in fact the 362 pieces were shipped by the consignor under those bills of lading. Not only is there no admission of the allegations that the 362 pieces were delivered "by mistake" and that the defendants have "refused to deliver" them to the plaintiffs, but it was admitted at the bar that these allegations were first made by the plaintiffs in a pleading delivered on January 4, 1937, and they were then pleaded as an alternative to the allegation that the defendants had accepted this quantity of timber in satisfaction of the plaintiffs' obligation to deliver other timber. It was indeed common ground that from 1933 to 1937 no request had been made by the plaintiffs that the 362 pieces should be re-delivered to them. It may well be thought that the true inference from the known facts is that the plaintiffs were well aware that the defendants were entitled to retain the 362 pieces. On the materials before the learned county court judge it would have been impossible for him to hold, and indeed he has not held, that the defendants were liable to the plaintiffs in tort.

(1) 118 L. T. 596.

The remaining question is whether the mere fact that a consignee has received from the shipowner a quantity of goods in excess of that specified in the bill of lading renders him liable to pay to the shipowner, or credit him with, the value of the overplus. The learned county court judge has answered this question in the affirmative. In so doing, he followed a previous decision of his own in which he had founded his judgment upon a dictum of Romer L.J. in *Mediterranean & New York Steamship Co.* v. *A. F. & D. Mackay.* (1) In that case there was a short-delivery of goods of one sort, but an over-delivery, which was accepted by the consignees, of goods of another sort. The decision of the Court was that the consignees had a claim for shortage and for an allowance in respect, first, of the freight attributable to the portion not delivered, and, secondly, of the value of the quantity which was not delivered. It appears that the consignees had in fact given credit to the shipowners for the value of the goods over-delivered (see the report of the same case in the Law Journal (2)), and in the course of his judgment Romer L.J. said: "I can find nothing in the circumstances of the case to "show that because they (the consignees) took the over-"delivery of scantlings and boards they must be taken to "have elected to treat the over-delivery as making up, so far "as it covered it, the shortage of deals. That being so, the "result would be that they would be entitled to compensation "for the deficiency of the deals, and ought to give credit for "the over-delivery in scantlings and boards. The amount "awarded in the Court below is the difference between the "loss by shortage of deals and the value of the over-delivery "of scantlings and boards, and appears to be right in every "respect." The report in the Law Journal attributes to the Lord Justice the further statement that the consignees had in fact given credit for the over-delivery. It may be doubted whether Romer L.J., in the passage quoted, intended to enunciate a principle of general application. Assuming that he did so intend, it is, we think, plain that his dictum was not necessary to the decision of the case, and nothing to the

(1) [1903] 1 K. B. 297, 305. (2) 72 L. J. (K. B.) 147, 150.

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same effect is to be found in the judgments of the other members of the Court. We were referred to a recent decision of Goddard J. (as he then was) in which doubt was expressed as to the correctness of the dictum and the accuracy of the reports: *Lauro* v. *L. Dreyfus & Co.* (1).

In the absence of any binding authority, it is necessary for this Court to decide the question according to general principles. It was argued that, just as the buyer who accepts a quantity of goods larger than he contracted to buy must pay for them at the contract rate (see s. 30, sub-s. 2, of the Sale of Goods Act, 1893), so, by analogy, the consignee who takes delivery from the shipowner of a larger quantity of goods than the bill of lading specifies must pay their value to the shipowner. In our view, the two cases are in no way analogous. As between seller and buyer, the delivery of a quantity larger than that specified in the contract was regarded at common law as a proposal for a new contract of sale which the buyer might accept by retaining the goods: see *Hart* v. *Mills* (2) and *Cunliffe* v. *Harrison* (3), per Parke B. As between shipowner and consignee, we can find no reason for holding that, whether (as was suggested) by implication of law, or by way of inference from the facts, the acceptance by the latter of the overplus of itself gives the shipowner a right to anything more than the payment of additional freight. Prima facie the shipowner is entitled to be paid for carrying the surplus goods, but not to be paid their value or their price. Even the right to additional freight, where goods are not mentioned in the bill of lading, and are thus, it would seem, not covered by s. 1 of the Bills of Lading Act, 1855, would appear to depend not on an implication of law, but on an inference which may properly be drawn from the facts: see *Sanders* v. *Vanzeller* (4); *White & Co.* v. *Furness Withy & Co.* (5), per Lord Herschell. In the present case there were no facts before the learned county court judge to support a finding that the defendants were bound by contract to pay to the shipowners the value of goods, the price of which, for all that appears from the admitted facts, either may have been paid long ago by the defendants to their vendors or may be a debt due from the defendants to their vendors which would not be satisfied by payment to the shipowners.

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(1) 59 Ll. L. R. 110, 116, 117.
(2) (1846) 15 M. & W. 85.
(3) (1851) 6 Exch. 903, 905.
(4) (1843) 4 Q. B. 260, 295.
(5) [1895] A. C. 40, 43.

Counsel for the plaintiffs sought to rely upon a passage in the speech of Lord Moulton in *Sandeman & Sons* v. *Tyzack & Branfoot Steamship Co., Ld.* (1), which deals with the position of a consignee whose goods have become "inseparably and "indistinguishably mixed" with those of another consignee, "without loss and without deterioration." Lord Moulton there says that if the consignee chooses to exercise his right to claim as tenant in common the mixture of his goods with those of another, "the shipowners are entitled to the benefit "of what he receives in reduction of damages for their breach "of contract." In the case supposed the consignee elects to exercise a right which he has acquired solely by reason of the shipowners' breach of contract. He thus becomes co-owner of a mixture in which the goods which should have been delivered to him as a separate entity have been merged. It seems almost self-evident that any profit which this co-ownership brings him should be set off against the loss occasioned by the breach of contract. In the present case the consignee is not shown to have received any countervailing advantage whatever which may be set against his loss, nor is there anything to show any commixtio of his goods with goods which are the property of another person. Here again the answer to the respondents' contention is that the appellants may well have had a right to receive not only the goods which the respondents failed to deliver, but also the 362 pieces which, according to the bill of lading, were over-delivered.

In the result, the appeal succeeds. The judgment of the county court must be varied, (I.) by omitting that part of it which adjudges that the plaintiffs are to be given credit for a sum to be assessed as the value of overage of delivery, and (ii.) by giving the costs of the issue raised by the reply to

(1) [1913] A. C. 680, 696. 697.

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the defendants instead of to the plaintiffs. The defendants are to have the costs of this appeal.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors for the appellants: *Pritchard, Sons, Partington & Holland, for Andrew M. Jackson & Co., Hull.*

Solicitors for the respondents: *Sanderson & Co., Hull.*

E. C. M. T.

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July 19, 29; *Dec.* 6.

Divorce—Wife's petition for dissolution of marriage—Husband's incurable unsoundness of mind—Degree of unsoundness of mind—Duty of guardian ad litem—Procedure as to communication of petition to and representation of alleged insane respondents—Supreme Court of Judicature (*Consolidation*) *Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176 (*d*), *as amended by Matrimonial Causes Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *ss.* 2, 3*—Matrimonial Causes Rules*, 1937, *r.* 64, *sub-r.* 4.

Where, on a petition for divorce on the ground of incurable unsoundness of mind, it has been decided that the respondent is of unsound mind and that that unsoundness of mind is incurable, the Court is not concerned with the degree of unsoundness save in so far as it is tested by the statutory test of care and detention for the requisite period. If the patient is still under certification, the Court need not be satisfied at the time of the hearing that the unsoundness of mind is such as must at that moment lead to a fresh certification.

On such a petition it is the duty of the guardian ad litem of the respondent to take every proper and legitimate step for the respondent's representation, and, if there is no independent person connected with the patient to undertake that function, it is the established practice of the Court that the Official Solicitor should do so.

It is necessary in such cases to keep the functions of guardian ad litem and receiver of the patient's estate completely distinct, and, whenever possible, a person independent of the mere receivership, unless the receiver be the Official Solicitor, should be appointed guardian ad litem, if such a person is available.

Rule 64, sub-r. 4, of the Matrimonial Causes Rules, 1937, which regulates (inter alia) the question of communicating to or withholding from an alleged insane respondent the contents of a petition, is not intended to apply to a case where a respondent can appreciate perfectly what is going on.

WIFE'S PETITION for divorce on the ground of her husband's incurable unsoundness of mind.

Mrs. Dorothy Katherine Randall petitioned in January, 1938, under the Matrimonial Causes Act, 1937, for the dissolution of her marriage with Mr. Bince Randall, whom she had married in September, 1914, on the ground that he was incurably of unsound mind and had been continuously under care and treatment for at least five years immediately preceding the presentation of the petition. The respondent

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was certified in 1932 and the reception order had remained in force ever since.

The respondent by his guardian ad litem, who was the receiver of his estate appointed under the Lunacy Act, filed an answer denying the allegations.

S. E. Karminski for the petitioner.

R. H. Bayford for the respondent.

1938. Dec. 6. THE PRESIDENT (SIR BOYD MERRIMAN). This case has caused me the very gravest possible anxiety. It is a petition by a wife under s. 176 of the Judicature Act, 1925, as amended by ss. 2 and 3 of the Matrimonial Causes Act, 1937, on the ground that the husband is incurably of unsound mind, and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. Care and treatment is for present purposes defined as being a period while he is detained in pursuance of any order under the Lunacy Acts, 1890 to 1930.

In fact the husband has been so detained since May 16, 1932, and it is a fact of history which admits of no discussion that that detention under a reception order made on that date had lasted continuously for the five years immediately preceding the presentation of this petition—namely, on January 26, 1938. About that element of the proof which the wife is required to give there is no doubt whatever, but it was apparent in the very early stages of this case, which was first heard on July 19 last, that so far as the question of unsoundness of mind was concerned it was a very doubtful case. It was a case on the border-line, and before that became clear Mr. Bayford, who appeared for the guardian ad litem, was instructed to tell me, as he did in the first minute after the case was called on, that he was not defending the case on merits.

Now this man is suffering from a defect of the mind which is, at present at any rate, manifested by and consists of an absence of will-power. He is perfectly sensible in all intellectual matters; he can talk perfectly sensibly; he can

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discuss subjects perfectly sensibly; he has no delusions now of any sort or kind. What is alleged is that his volition is so defective as to amount to unsoundness of mind justifying his detention.

Most unfortunately two things happened in connection with the presentation of this case, which have caused me the anxiety to which I referred. The first is that the receiver, a chartered accountant, who tells me—and I have no reason whatever to disbelieve him—that he is a very busy man in other ways, was appointed guardian ad litem, and by his own account of the matter has completely failed to realize that his duties as guardian ad litem were entirely separate from his duties as receiver. In fact, he has taken no sort of part in deciding whether this case should be defended; he has merely taken what he calls the instructions from the solicitors who were representing him as receiver.

The other unfortunate thing was this, that it was decided under the Rules that the husband should not be informed of the proceedings. Rule 64 provides that a person in charge of a person of unsound mind—I am not quoting the exact words—may, on medical advice, decide not to inform the patient of the fact that a divorce petition has been presented against him. In this case the person who took that decision is a layman in charge of a licensed house, where patients, including the husband, are received into single care. He is not a medical man, he is not a lawyer, and he addressed what I understand was a casual question to a local general practitioner as to whether this patient should be informed of what was going to affect the whole of the rest of his future life. Most unfortunately, as everybody agrees—at least, everybody whose opinion I regard as of importance in the matter agrees—this was an entirely wrong decision. A specialist who was called for the wife says it was wrong; Dr. Bernard Hart, who was brought in at my instance, definitely said it was wrong; and I think it was a most deplorable decision, in the circumstances of this case.

Manifestly the Rule is not intended to deal with a case

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like this, where a man is perfectly sensible in every respect and can appreciate perfectly what is going on. It was intended to deal with circumstances far different, and the decision was a most unfortunate one. It had, of course, inevitably a repercussion upon the attitude of the guardian ad litem; he was excused from taking any instructions from the man whom he was representing, because ex hypothesi it was supposed to be impossible for him to give those instructions. At any rate, it was difficult, if not impossible, for the guardian ad litem, if he had been minded to do so, to take any part in consultation with the man principally concerned.

Now I want to say this, so that there may be no mistake about it whatever: a person who accepts the duties of guardian ad litem does not do so, as this guardian said that he did, as a matter of form. A guardian ad litem on behalf of an insane person or an infant represents that person before the Court, and it is his duty to see that every proper and legitimate step for that person's representation is taken. He has got to give his mind to it, and decide for himself upon the material put before him what course of action to take. I agree that the guardian was handicapped, as I have already said, by the decision of the manager of the house where the husband was detained not to show the petition to the husband, but, if anything, that made it more incumbent upon him to satisfy himself affirmatively that no stone was left unturned to ensure that this man's case was fully put before the Court in all its aspects.

I wish to say something in that connection about the advisability of appointing receivers, other than the Official Solicitor, as guardians ad litem. The matter has come before me not in reference to any particular case, but generally in connection with those patients who are in public institutions, and with regard to whom it is suggested that the accountant to the authority, or someone in a similar capacity, should act as guardian ad litem. I have made it quite clear that the Court would not approve of that suggestion. On the contrary, I think I may now say that it is an established practice that if no independent person, no person connected with the patient, is available in such circumstances to act as guardian, then the Official Solicitor himself undertakes that function. That has this vital effect: there are, of course, most important questions to be decided as to the financial arrangements to be made by a petitioner on behalf of an insane spouse who is being divorced; in that aspect of the matter, of course, an accountant to a public authority, or a receiver in a private case, is as well qualified as anybody—no one better; but before one gets to that point there is the more important question whether the case is proved against the respondent, who is handicapped, of course, by the fact that he or she is in detention; and it is very desirable, and the practice is based upon the fact that it is very desirable, that the financial aspect of the matter should not necessarily be uppermost when the guardian ad litem has to take responsibility on the very important issue whether the insanity is or is not proved.

I think I may say also that the Management and Administration Department are taking a similar line with regard to the appointment of receivers as guardians ad litem. At any rate, so far as the Court is concerned, it may be taken that whenever possible a person independent of the mere receivership of the estate should be appointed guardian ad litem, if such a person is available. This case has shown conclusively how necessary it is to keep the functions of guardian ad litem and receiver completely distinct.

Now in a border-line case of this description, particularly bearing in mind that the onus is upon the petitioner, it is also unfortunate that nobody has examined this patient during the five years period with the point expressly in mind whether it was necessary to continue the care and treatment on a compulsory basis, or, indeed, to continue it at all. It is true that as recently as 1934, Dr. Vosper, who was inspecting the place where the husband was detained, did have a conversation with the husband on the subject of his being let out. Such a discussion undoubtedly occurred, but nothing further was done about it. Dr. Vosper himself told me he certainly did not think that it would be desirable, at any rate, that he should be discharged altogether, because he said that he would have been prepared to consider the substitution of voluntary treatment under the Mental Treatment Act, 1930, for detention, providing suitable arrangements were made at his home for that purpose.

Again, in 1936, Dr. Devas in the course of his official duties as one of the Commissioners, reported to the Board of Control that he had a long talk with the patient about his present mode of living and the possibilities of his returning to his home and work. Eventually the respondent said that he would like to return, but added that he had better wait until the end of the summer, as then there would be less work to do, and he would have more time to get quite well. "I came to the conclusion," the report reads, "that he was not really anxious to return "home, and I did not consider he was in a fit state to manage "his affairs," and so on, on the same lines. But there again the matter was never tested out, and the importance of it, of course, is this: having regard to the evidence that Dr. Bernard Hart has given, it is quite clear that there might very easily have been a difference of opinion whether it was necessary to keep this man under any form of certification or not, at any rate, by the year 1936. But, as I have already said, the thing never having been put to the test in that way, the statutory period has actually run out and become an established fact, and the only bearing of the hypothetical question whether it would or would not have been continued if the matter had been put to the test, is on the question of unsoundness of mind and its incurability, the burden of establishing which is upon the petitioner.

Now I was, I think naturally, so much disquieted by the circumstances to which I have alluded, that at the first hearing I intimated that I must have an independent medical opinion. The result was that on the recommendation, but not, as I understand it, on the direct appointment of the Board of Control, two or three names were suggested from which the parties could take their choice, and Dr. Bernard Hart was selected, and I am quite satisfied that no better selection could have been made. Dr. Hart has been of the greatest possible assistance to the Court in this case. He has dealt with the matter with complete detachment, and, if I may say so, with great clarity, and I am most grateful to him for his assistance. The necessity for calling in Dr. Bernard Hart will be made even clearer when I say that, having made two examinations between the first hearing and the second hearing on July 29, one of which was on the night before the latter date, namely, the 28th, Dr. Hart, as he has told me quite frankly, was really in a complete state of doubt himself as to what the truth of the matter was. He put it in a sentence, saying that if he were asked to certify on those two examinations in July he would have refused to do so, but equally, if he were asked to release, he was in doubt whether he would not also have refused to do so. In any case he said that he could not give me an opinion which would satisfy himself unless he could have further opportunity for investigation. That was so reasonable that I adjourned the case to these Sittings in order that Dr. Hart should have a further opportunity of examining, and I have now had the benefit of his considered opinion as a result of those examinations.

Here let me say one word about the issue of unsoundness of mind. I am not going to lay down any test of the degree of unsoundness of mind necessary for the purposes of the Matrimonial Causes Act, because to do so would serve no useful purpose and might create difficulties, but in this case Dr. Hart did indicate to me that he was testing the question of whether there was or was not unsoundness of mind rather in the terms of the medical certificate which a doctor is called upon to give at the time of the reception order, in other words the certification by a medical practitioner, which is to the effect that the doctor has come to the conclusion that the patient is a person of unsound mind, or as the case may be—there are other words—and a proper person to be taken charge of and detained under care and treatment. Now, of course, it is quite plain that a patient cannot be certified in the first instance without a doctor or doctors being prepared to give that opinion as

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being the proper conclusion to be derived from the facts that they have observed themselves and the facts that they have ascertained; and though it is equally clear that the judge at the trial has to be satisfied that there has been a reception order based on such a certificate in the first instance and that the care and treatment has continued thereunder, it is, I think, quite clear that the Matrimonial Causes Act, 1937, recognizes that the unsoundness of mind may be present notwithstanding that the initial detention under the reception order has not been continuous, for by s. 3 (*b*) it is provided that the spouse shall be deemed to be under care and treatment while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, being treatment which follows without any interval a period of such detention as aforesaid, the detention as aforesaid being, of course, detention in pursuance (inter alia) of a reception order under the Lunacy Acts.

I cannot think, therefore, that it would be right to say that the Court must be satisfied at the time of the hearing that the unsoundness of mind is such as must at that moment lead to a fresh certification. After all, the whole object of care and treatment is the improvement of the patient's mental condition, and nobody can dispute, and nobody does dispute, that at the time of the original certification this husband was unquestionably of unsound mind. I am not going to refer in detail to the certificate given at the time, because there is no dispute about it. The respondent himself has admitted to everybody with whom he discussed this matter, in a perfectly sensible way, that at the time he was certified he was undoubtedly suffering from a very definite derangement of mind, but equally it is unquestionable in this case that the care and treatment which he has received continuously at Mr. Heywood's Home—and it is all the more credit to Mr. Heywood that it is so—has had a most beneficial effect, and has got him into a state in which, to put it at its very lowest, it is at least doubtful whether any responsible medical man would certify him afresh at this moment.

But it does not follow from that that he is not of unsound

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mind within the meaning of the Matrimonial Causes Act. Otherwise, this provision that the care and treatment for five years continuously need not necessarily involve detention for the whole period of five years, but may involve merely treatment as a voluntary patient—provided it is continuous on detention—would be quite meaningless.

It remains, therefore, to consider what is the real effect of Dr. Hart's evidence. I am bound to say, and I say it without any disrespect whatever to those who gave evidence earlier, that I must necessarily pay more attention to Dr. Hart's evidence because he is the only medical man who has examined this patient in the light of this divorce suit. I do not mean in the course of the divorce suit, or in anticipation of the divorce suit. Dr. Risien Russell, I am fully aware, examined him on the eve of the petition; Dr. Sotheran, I am fully aware, examined him after the petition had been filed, with a view to considering the question of defence; but none of these doctors examined a man who knew that there was a petition for divorce on the ground of insanity against him, and Dr. Hart was the only one who had that advantage; indeed, it was Dr. Hart himself who, quite rightly in my opinion, before the last hearing, took the responsibility of telling the patient that there was, in fact, a divorce suit pending, though he did not tell him that it had already come on and that evidence had been given; and for that reason, as I have already said, I have been greatly impressed by Dr. Hart's candour and clarity in giving his evidence, and I am giving the decision that I am about to give on his evidence.

He has satisfied me that the very minimum of care and treatment required in the case of this husband would be care and treatment as a voluntary patient, and that that is the least which, so far as he can judge from what he has seen now, and assuming, as I am prepared to assume, that the husband is now in a better condition than he was even during the latter part of the five years, would have satisfied Dr. Hart at any time since his condition began to improve. Without going through his evidence in detail, he says that

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he is quite certain that whatever form of care and treatment is adopted in the future, whether it is voluntary or whether it is by detention, the man is of unsound mind; and in another part of his evidence he said that small improvements are always possible, but the condition is irrecoverable; the acute condition which existed formerly has disappeared, but there is an irreducible minimum of unsoundness of mind manifesting itself, as I have already said, by the absence of volition, which every doctor who has examined him, and Mr. Heywood, who is in charge of him, has spoken of.

He said in terms that such as this defect is, there is no doubt whatever that it is incurable, and used a metaphor to the effect that the original breakdown had caused scars, not in the literal sense, but figuratively, and that, though the symptoms had disappeared and the condition generally had improved, that scarring of the mental condition must necessarily remain for all time. That is what he meant by saying that there is an irreducible minimum of unsoundness of mind. He satisfied me that he would be very reluctant to allow the patient to go out as a voluntary patient unless he personally was satisfied with the conditions under which that arrangement was made, and that if it was desirable to allow him to live in the way that he sometimes expressed a desire of living—with a small cottage and a small garden—the proper way to give effect to that would be to change the single care order from his present place to any such cottage; then, of course, he would still, within the meaning of the Act, be in detention under a reception order and in single care, as at present.

In spite of the doubts and hesitations which have affected me, having regard to the way in which this case came before me, I am satisfied that the burden of proof is discharged, and that though the husband's is a mild case, he is of unsound mind, and that his unsoundness of mind is incurable. Having arrived at that decision—that there is unsoundness of mind and that it is incurable within the meaning of the Acts—I am not concerned with the question of degree at all, except in so far as that is tested by the statutory test that there has been care and detention for the requisite period. That being so, I pronounce a decree nisi.

His Lordship made no order as to costs.

Solicitors: *Taylor, Willcocks & Co.*; *Field, Roscoe & Co.*

W. L.

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Nov. 30.

BUSH *v.* BUSH.

Divorce—Wife's petition for divorce on ground of desertion—Continuing desertion negatived by presentation of previous petition by wife—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*), *as amended by Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2.

Where a wife had presented a petition for divorce in 1936 on the ground of alleged adultery, but had not pursued it after the husband filed an answer denying the charges, and in 1938 procured its dismissal in order to present a fresh petition for divorce on the ground of desertion, it was *held,* following *Marthews* v. *Marthews* [1939] P. 97, that, so long as the decision of the Court of Appeal in *Stevenson* v. *Stevenson* [1911] P. 191 stood, it was impossible for desertion to continue during a period for which the same party's petition for divorce was on the file of the Court.

Reasoning in *Johnson* v. *Johnson* [1938] W. N. 299 doubted.

WIFE'S SUIT for divorce on the ground of desertion.

Mrs. Elsie Irene Geraldine Bush on March 24, 1938, presented a petition for the dissolution of her marriage on the ground that Mr. Gilbert Stares Bush, whom she married in 1919, had deserted her without cause for a period of at least three years immediately preceding the presentation of the petition. The husband deserted the wife in December, 1933. The wife filed a petition for divorce on the ground of the husband's alleged adultery on June 5, 1936. By his answer the husband denied the charges. The wife did not proceed with that petition, being advised that the evidence available was not sufficient. On February 18, 1938, that petition was dismissed on the wife's application with a view to the presentation of the petition above mentioned. The fresh petition was not defended.

B. Stuart Horner for the petitioner.

1938. Nov. 30. THE PRESIDENT (SIR BOYD MERRIMAN). In this case the wife is petitioning for divorce on the ground that her husband has deserted her for a period of at least three years immediately preceding the presentation of the petition. The petition, which is dated March 21 of this year, was in fact presented on March 24. She has therefore to satisfy the Court that her husband had deserted her for three years immediately preceding March 24 last.

The parties were married in 1919. By November, 1933, the husband, who by that time had begun to neglect his wife, demanded a separate room, and had plainly indicated to her that he was tired of her and wanted no more to do with her. On December 5, 1933, he deserted his wife. The date can be fixed with precision by a telegram which he sent on that date, and subsequent correspondence shows that he maintained the same attitude, and I am quite satisfied in my own mind that so far as his intention was concerned it has remained unchanged ever since.

The difficulty in this case, however, is that on June 5, 1936, which is exactly two and a half years to the day from the date when the wife was deserted, she presented a petition for dissolution of marriage on the ground of her husband's adultery with a woman who was living in the same house as he was. That petition remained on the files of this Court until February 18 of this year, when it was dismissed at the instance of the wife in order to make way for the present petition. Mr. Horner, who has argued this case very clearly and forcibly, has told me that that petition was not proceeded with because the wife was advised that, suspicious as the circumstances were, it would not be possible to invite the Court to find adultery on the evidence that was available to the petitioner. Nevertheless, the fact remains that from June 5, 1936, to February 18, 1938, she had a petition on the file of the Court praying that her marriage might be dissolved on the ground that her husband was living in adultery with this particular woman. Now it follows from what I have said that before the presentation of the present petition only one month and a few days had elapsed after the earlier petition was dismissed.

Therefore, unless the wife can ignore the petition which

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she herself presented, or, rather, ignore the fact that for the time I have mentioned this petition was on the file of the Court, she cannot make up a period of three years, continuous or otherwise. The desertion, as I have said, had lasted exactly two and a half years before this petition, and one month and a few days after her petition was dismissed. She has therefore to seek to include, in the period of desertion alleged, the time when her petition for dissolution was upon the file.

Counsel has given me the benefit of an elaborate review of the authorities. I reminded him early in the argument that two of my brethren had recently given judgments on this point following the decision of the Court of Appeal in *Stevenson* v. *Stevenson.* (1) In *Stevenson* v. *Stevenson* (1), after a corresponding review of the authorities, Sir H. H. Cozens-Hardy M.R. said: " At the date of the petition there had "not been desertion for two years, such as is required by the "statute. The desertion had lasted eighteen months only. "The presentation of the petition and its continuance on the "files of the Court prevented subsequent desertion from being "without excuse. She was praying the Court to require her "husband to keep away."

I am not oblivious of the fact that that was a case in which the petition referred to had been a petition for judicial separation. It seems to me that the case of a petition for dissolution is a fortiori. There the spouse is petitioning not merely that the other spouse shall keep away, but is petitioning that the marriage itself shall be dissolved, and counsel does not dispute that in a petition for dissolution based upon an allegation of adultery it would be a contempt of Court which could be prevented if the other spouse, after the presentation of the petition, tried to force himself or herself into the matrimonial home in order to get, for example, a condonation of the adultery.

Moreover, in the judgment of the Court of Appeal to which I have just referred, pointed approval is given to the judgment of Gorell Barnes J., as he then was, in *Kay* v. *Kay* (2), where,

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(1) [1911] P. 191, 194.

(2) [1904] P. 382.

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even if his remarks were obiter in relation to the facts of that case, he dealt expressly and in terms with the case of a presentation of a petition for dissolution based upon adultery, and whether that passage in the judgment was or was not obiter in the circumstances of the case, it has, as I say, received the express approval of the Court of Appeal.

In those circumstances it would be manifestly idle for me to indulge in a review of passages in other judgments, notably passages in the judgments of Buckley and Vaughan Williams L.JJ. in the decision of the full Court of Appeal in *Harriman* v. *Harriman*. (1) It is sufficient to say that the passages referred to, and, in particular, the passage in the judgment of Buckley L.J., were in marked contrast with passages on the same point in the majority of the judgments, and received no approval whatever when the matter was discussed again in the argument in *Stevenson* v. *Stevenson*. (2)

Moreover, as I have already said, Langton J. and Henn Collins J. have both considered this point quite recently in view of the decision in *Stevenson* v. *Stevenson*. (2) Even if I did not agree with these two judgments, one of which was delivered after consideration, and the other, *Walton* v. *Walton* (3), in the light of the judgment of Langton J. in *Marthews* v. *Marthews* (4), I should have very great hesitation in differing from them. In fact, I entirely agree with both of them, and it is quite plain that so long as the decision in *Stevenson* v. *Stevenson* (2) stands, this Court is bound to hold that it is impossible for a wife to allege that desertion continues during the period in which she herself is presenting a petition for dissolution on the charge of adultery.

It is, therefore, impossible to accede to the argument that the whole of this period can be counted continuously from December 5, 1933, up to the presentation of the present petition, ignoring the twenty months or thereabouts during which the petitioner herself had a petition for dissolution on the file of the Court.

Counsel referred me to the judgment in *Johnson* v.

(1) [1909] P. 123, 148.
(2) [1911] P. 191.
(3) [1939] P. 104.
(4) [1939] P. 97.

Johnson. (1) I am not satisfied that the reasoning in that judgment, based upon s. 6 of the Matrimonial Causes Act, 1937, is sound. I think that that section is dealing with an entirely different subject-matter, and that it is not possible to deduce from express provisions, designed to meet the case where a judgment of this Court or of a court of summary jurisdiction has been given, any conclusion as to the effect of the mere presentation of a petition, and in my view the Matrimonial Causes Act, 1937, has not altered the law as laid down by *Stevenson* v. *Stevenson.* (2) It may be that the question whether, there having been a complete period of desertion, as in *Johnson* v. *Johnson* (1), before a petition is presented, and a period of desertion after the dismissal of the petition, it is possible, so to speak, to add the two together, in order to get a cumulative period of three years and upwards which continues down to the presentation of the petition, may have to be considered in due course. But that is not this case, because, as I have already said, even on that method of approach the wife cannot make up a period of three years, continuous or otherwise.

For those reasons I am obliged to dismiss this petition.

Solicitor: *Edgar H. Hiscocks.*

(1) [1938] W. N. 299.

(2) [1911] P. 191.

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SHIPMAN *v.* SHIPMAN (BY HER GUARDIAN).

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July 21 ;
Nov. 21,
Dec. 9.

Divorce—Husband's petition for dissolution of marriage—Wife's alleged incurable unsoundness of mind—Degree of insanity—Care and treatment—Continuity of five years' period of detention broken—Absences on trial—No "provisional discharge" permissible—Petition dismissed—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176 (*d*)—*Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *ss.* 2, 3—*Lunacy Act,* 1890 (53 *&* 54 *Vict. c.* 5), *s.* 55—*Mental Treatment Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 23).

In a husband's suit for divorce under the Matrimonial Causes Act, 1937, on the ground of the wife's incurable unsoundness of mind, conjoined with continuous care and treatment for five years and upwards immediately preceding the petition, it was established that the respondent had been allowed to stay with a sister during the last five years for periods totalling in all close on a year. Her absences from the mental hospital were purported to be sanctioned by orders which were expressed to be by way of "provisional discharge":—

Held, (1.) If satisfied that unsoundness of mind exists in an incurable form, the Court is not concerned with the degree of insanity, except in so far as it is to be inferred from the statutory test of the prescribed care and treatment.

(2.) Under the lunacy laws there was no such thing as a "provisional discharge."

(3.) Although the orders were irregular, the respondent's absences were in fact absences "on trial" under s. 55, sub-s. 1, of the Lunacy Act, 1890, and accordingly the reception order remained in force at all material times.

(4.) The requirement of s. 3 (*a*) of the Matrimonial Causes Act, 1937, that a person of unsound mind shall be deemed to be under care and treatment while detained in pursuance of any order . . . . under the Lunacy and Mental Treatment Acts, 1890 to 1930, was not satisfied merely by the fact that the reception order was in force during the whole of the prescribed period, and absence on trial for prolonged and indefinite periods was not the same thing as actual detention under an order which was being enforced.

Semble, detention under a reception order would not be interrupted by routine outings in the daytime, or by an occasional absence for three nights or four days under the regulations, on the de minimis principle.

HUSBAND'S PETITION for divorce on the ground of the wife's incurable unsoundness of mind.

Mr. Alfred Bernard Shipman, of Bridlington, Yorkshire, in his petition filed on February 18, 1938, prayed for the

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dissolution of his marriage, solemnized in June, 1907, on the ground that his wife was incurably of unsound mind and had been continuously under care and treatment for five years and upwards immediately preceding the presentation of the petition. An answer was filed by the guardian ad litem for the respondent denying the allegations.

The respondent was first detained under a reception order in 1915 and was discharged in 1924. She was again certified in 1926, a reception order being made on July 2. Thereafter she was released from the mental hospital at which she was detained for various periods, which she spent with a sister. On December 21, 1933, an order was made as follows purporting to sanction her absence: "Order for Discharge of Patient. "We, the undersigned, being members of the Committee of "Visitors, with the advice of the medical officer, hereby order "the provisional discharge of (the respondent) now detained "in this mental hospital, on trial from this mental hospital "until we make further order or until the relapse of the "patient, whichever should first take place." The signatures of two visitors were appended, and the medical officer added a certificate that the patient was in a fit state to be "provisionally discharged." With slight variations similar orders were made in respect of subsequent absences of the respondent.

On July 21, 1938, the case was referred by the President to the King's Proctor for argument on the question whether or not the continuity of the prescribed period of care and treatment had not been broken so as to bar relief.

S. E. Karminski for the petitioner.

H. W. Barnard for the respondent.

Sir Terence O'Connor S.-G. and *Theodore Turner* for the King's Proctor.

Cur. adv. vult.

1938. Dec. 9. THE PRESIDENT (SIR BOYD MERRIMAN) delivered the following reserved judgment: This is a husband's petition under s. 176 (*d*) of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 2 of the Matrimonial Causes Act, 1937, for divorce on the ground that the wife is "incurably of unsound mind and has been "continuously under care and treatment for a period of at "least five years immediately preceding the presentation of "the petition." The wife is defending the suit, through her sister who was appointed guardian ad litem, and contends that the husband has not proved his case in accordance with the Acts. Mr. Barnard, quite rightly in my opinion, has abandoned any attempt to contend either that the wife is not of unsound mind, or that her condition is curable. Unfortunately the terminology of this branch of medical science does not yet appear to be standardized, and some doubt was at first occasioned, in my mind at any rate, by the fact that the only medical witness, the superintendent of the mental hospital in which the wife is a patient, used every technical term in a different sense from that intended by the doctors who gave evidence in the preceding cases in the same list, and were men of outstanding eminence in this subject, saying, in effect, that no one who knew his business could use these terms in any other sense. Nevertheless I am satisfied that the wife is suffering from dementia—I purposely refrain from affixing any epithet—and that, if her disease ever was curable, it has long since reached a stage when cure is impossible. It is unnecessary to say more about this element in the case.

But the petitioner is also required to prove that she has been "continuously under care and treatment for a period "of at least five years immediately preceding the presentation of the petition," and by s. 3 of the Matrimonial Causes Act, 1937, "a person of unsound mind shall be deemed "to be under care and treatment" (omitting immaterial words) "(*a*) while he is detained in pursuance of any order ". . . . under the Lunacy and Mental Treatment Acts, 1890 "to 1930 . . . . and not otherwise." It is to be observed first that it is only while the wife is detained in pursuance of such an order that she is deemed to be under care and treatment, and, secondly, that the statutory test is not satisfied unless she has been continuously under care and

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treatment, thus defined, for the statutory period. In other words, in the circumstances of this case, the husband has to prove that she has been continuously detained under such an order for the prescribed period of five years.

In this case a reception order, which is admittedly an order of the kind referred to in the section, has been made in respect of the wife on two occasions. The first was made on July 31, 1915, and was discharged on October 1, 1924. The second was made on July 2, 1926. The order in each case was for her reception in the East Riding of Yorkshire Mental Hospital, as it is now called. With regard to the second reception order, with which alone I am directly concerned, two questions arise: first, whether or not at the time of the presentation of the petition the reception order remained in force, having regard to certain orders made meanwhile by the visiting justices; and secondly, assuming the reception order still to be in force, whether the wife can be held to have been detained in pursuance thereof continuously for the prescribed period, when, for periods amounting in all to little less than one year out of the last five, she has in fact been at large in circumstances which I will describe in detail later.

The first question is of comparatively limited importance, though undoubtedly it may affect other patients in the area concerned. The second question raises a vital and difficult point in connection with the statutory definition of "care and treatment," and is one of great general importance. Therefore I referred the case, at the conclusion of the evidence, to the King's Proctor for argument on both points under s. 181, sub-s. 1, of the Judicature (Consolidation) Act, 1925. I have had the benefit of admirable arguments by the Solicitor-General, who appeared with Mr. Turner on behalf of the King's Proctor, and by Mr. Karminski and Mr. Barnard for the two parties; and I am most grateful to counsel for their assistance.

It will be convenient before detailing the facts if I summarize the material provisions of the Lunacy Act, 1890. Though the nomenclature has since been changed by the Mental Treatment Act, 1930, the particular provisions of the Lunacy Act, 1890, applicable to this case are those relating to the reception and detention of a "lunatic" in an "asylum" by order of a justice made upon sworn information; and, for convenience, I propose to use the old terms. By s. 13, sub-s. 2: "Any "such justice being a judicial authority under the Act upon the "information on oath of any person whomsoever, that a "person . . . . is deemed to be a lunatic and is not under "proper care and control, ... may himself visit the alleged "lunatic, and shall, whether making such a visit or not, direct "and authorise any two medical practitioners whom he "thinks fit to visit and examine the alleged lunatic and to "certify their opinion as to his mental state, and the justice "shall proceed in the same manner so far as possible, and have "as to the alleged lunatic the same powers, as if a petition "for a reception order had been presented by the person by "whom the information with regard to the alleged lunatic "has been sworn."

Both reception orders in this case were made by a justice under this section, by the very terms of which one is referred to the procedure and powers of a judicial authority in connection with a petition for a reception order. It is unnecessary to quote the relevant sections. It is sufficient to say that s. 9 provides the definition of a judicial authority, which includes justices of the peace specially appointed in accordance with s. 10. Sect. 4, sub-s. 2, and s. 5 lay down the procedure for the presentation of a petition; and s. 6 prescribes the procedure thereon. The power to make a reception order is contained in s. 6, sub-s. 4. Finally by s. 4, sub-s. 1 (omitting words irrelevant to this case and incorporating the material parts of the definitions in s. 341), it is enacted that: "Subject to the exceptions in this Act "mentioned, a person shall not be received and detained as a "lunatic in an asylum provided by the East Riding of York-"shire unless under an order made for the reception of the "lunatic in the asylum."

By s. 35 the reception order is the authority for the person authorized to do so to take the lunatic and convey him to the asylum, and for his reception and detention therein. But for the reception order, whether made upon petition or by a justice upon sworn information, the reception and subsequent detention would, by the express words of s. 4, sub-s. 1, be illegal. On the other hand, as will appear, the reception order, so long as it remains in force, is authority not only for the original reception and detention but, in certain circumstances, for fresh reception and detention from time to time. The duration of a reception order is dealt with by s. 38, as amended by s. 7 of the Lunacy Act, 1891. It is sufficient to say that, if this reception order was in force at the material time, it need only be renewed every five years. The last two renewals were on June 6, 1933, and June 3, 1938, the latter, of course, being after the presentation of the petition.

Discharge from an asylum is dealt with in s. 77, by sub-s. 1 of which any three visitors of an asylum may order the discharge of any person detained therein, whether he is recovered or not, and by sub-s. 2 of which any two visitors, with the advice in writing of the medical officer, may order the discharge of any person detained in the asylum. It is to be observed, however, that though discharge can be effected by two visitors only upon the advice in writing of the medical officer, three visitors may order discharge whether the patient is recovered or not, and without his advice. It is not expressly laid down that discharge under sub-s. 2 depends upon the complete recovery of the patient. I am prepared to assume, as appears to be generally accepted, that the medical officer may advise discharge, in appropriate circumstances, though the patient is not recovered. As will be seen, that is precisely what occurred in connection with the first reception order in respect of the wife. It is also to be observed that though the medical officer's advice must be in writing, there is no provision, under either sub-section, that the visitors' order of discharge must be in writing, or in any particular form. In this connection reference must be made to s. 339, whereby, subject to rules made under the Act, the forms in the Second Schedule may be used, wherever applicable, with such modification as circumstances may require and, if used, shall be deemed to be sufficient. For example, Form 15 in the Second Schedule is that for a justice's reception order under s. 13, but there is no form in the Schedule either for discharge, or for any of the temporary releases to which I am about to refer.

It is also very important to note that there is no such thing as a "provisional" discharge. Once the order for discharge has been made, the procedure for certification, reception and detention must, if it becomes necessary, begin afresh.

Apart from removals, temporary or otherwise, which are particularly dealt with in ss. 36 and 37, there are several ways recognized by the Act in which a patient may in fact be at large from the asylum, though the reception order remains in force. I will begin with the groups of sections relating to escape. By s. 85 it is enacted that "If any person "detained as a lunatic under this Act escapes, he may, "without a fresh order and certificate or certificates, be "retaken at any time within fourteen days after his escape "by the manager of the Institution . . . . in which he was "detained, or any officer, or servant thereof respectively, ". . . . or by anyone authorised in writing by such manager, ". . . ." I call attention, in passing, to the use of the past tense in the phrase "in which he was detained."

The next three sections relate to escape from England into Scotland or Ireland, and vice versa respectively, and to the issue of warrants in each country for the retaking of the lunatic and bringing him back to the place where the lunatic was detained. By s. 89 a warrant, granted under any of the three preceding sections, does not authorize the retaking of a lunatic after the expiration of the time during which he could have been retaken according to the law in force in the place where he was detained as a lunatic, if he had remained there after his escape. In other words, for example, if a lunatic detained in England escaped to Scotland, a warrant for his recapture would expire fourteen days after his escape, whereas in the converse case the period would be twenty-eight days: see s. 6 of the Lunacy Acts (Scotland) Amendment Act, 1866. Again I emphasize the words: "in "the place where he was detained as a lunatic."

Sect. 57 relates to the boarding out of pauper lunatics only. Again, it is unnecessary to refer to the details of these provisions which, like those relating to single patients and private patients, are not directly in point. It is only necessary to observe that the provisions of s. 57 provide for the delivering of a pauper lunatic to the "custody" of a relative or friend.

This brings me to what, for the purposes of this case, is the most important section of all, s. 55, relating to absence on trial or for health. I must examine those provisions in some detail, but I pause to observe that though the section deals, amongst others, with pauper lunatics in an asylum, there is, in contrast to s. 57, no hint or suggestion throughout the section that the absences dealt with involve any sort of custody or detention. Sub-s. 1 enables any two visitors of an asylum, with the advice in writing of the medical officer, to permit a patient in an asylum to be absent on trial so long as they think fit. This applies to all patients in an asylum, whether paupers or not, though by sub-s. 2 an appropriate allowance may be made in respect of a pauper lunatic absent on trial. Again it is to be observed that although the advice of the medical officer must be in writing, the order of the visitors need not be. I was informed that, acting upon an opinion of the Law Officers given over thirty years ago, it is not considered essential that the visitors' order for absence on trial should, in the first instance, fix a specified period. It is clear from the speech of Lord Cave L.C. in *Harnett* v. *Bond* (1), where a form of order for absence on trial, under the corresponding provisions relating to private patients, was quoted without criticism, that, even if a period is fixed, it is permissible to provide that the leave of absence is revocable by the visitors during the period, and that the medical officer shall have power to take back the patient before the expiration of the period if his mental condition requires it. But, whether the period is fixed ab initio or ex post facto, it is provided by sub-s. 8 that "If a person "allowed to be absent on trial for any period does not return "at the expiration thereof, and a medical certificate certifying

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(1) [1925] A. C. 669, 676.

"that his detention as a lunatic is no longer necessary is not "sent to the visitors of the asylum . . . . he may at any "time within fourteen days after the expiration of the period "of trial be retaken as in the case of an escape." That is to say, by virtue of s. 85 he may, without a fresh order and certificate or certificates, be retaken at any time within fourteen days by the manager of the asylum in which he was detained.

Sub-ss. 3, 4, 5 and 6 contain the corresponding provisions relating to patients in hospitals (not being asylums) or licensed houses. Para. (*b*) of sub-s. 3 relates to absence on trial in such cases, while para. (*a*), to which there is no corresponding provision in respect of an asylum, is usually referred to, I was informed, as absence "on holiday." Sub-s. 7 enables the medical officer of a hospital or licensed house on his own authority to permit any patient to be absent for a period not exceeding forty-eight hours. Again there is no provision corresponding to this in the case of an asylum; but by s. 275, sub-s. 5, regulations which may be framed under this section may provide, amongst other things, for the absence, for a period not exceeding four days, of a patient from the asylum by permission of the manager. I was informed that in the East Riding Mental Hospital regulations are in force enabling the manager to grant leave of absence for three nights or four days.

With the provisions of these sections in mind I now turn to the history of this case. As I have already said, the first reception order was made on July 31, 1915. From then until October 3, 1923, the evidence is that the wife remained, to use a neutral word, continuously in the asylum. During this time the husband was visiting her at fairly regular intervals. On October 3, 1923, she was released on a form of order which, both in the original form in vogue in that year and the altered form in vogue during the later reception, has caused the difficulties in connection with the first point to which I referred at the beginning of my judgment. Before I deal with this, however, I will say a word about the circumstances of the release. It was at the instance of the wife's sister, as indeed were all the subsequent releases. The husband stated in evidence that he strongly disapproved of it, and the result was that from that time onwards he took little, if any, interest in his wife and hardly visited her at all. But it is not inopportune to observe, as Mr. Karminski frankly admitted, that the very point I have to decide on the issue relating to "care and treatment" would have arisen if, to take the actual dates in this case, the wife in the week after the special report and certificate of June 6, 1933, which had the effect of renewing her reception order until June, 1938, having obtained an order for absence on trial, had gone to live with her husband, and they had lived together as husband and wife continuously from then until the date of the petition, February 18, 1938.

To return to the wife's release in October, 1923. The form is headed "Order for discharge of Patient." It is a composite form which can be, and later was, adapted to what, as I have already explained, is the only discharge known to law—namely an absolute discharge. It reads as follows: "We, "the undersigned, being members of the Committee of "Visitors, with the advice in writing of the medical officer, "hereby order the provisional discharge of the wife." Pausing there, the word "provisional" is filled in in writing in a blank space left between the words "the" and "discharge." The form continues, "now detained" (the words "away on trial" being struck out) "from this asylum on trial" and here the printed words "to the next meeting of the Committee" are deleted, and the words "from this asylum until we "make further order or until the relapse of the patient, whichever "should first take place" are written in. The form is dated and signed by the two visitors, and underneath is a certificate from the medical officer that the above named patients are in a fit state to be provisionally discharged. Again the word "provisionally" is written in in a blank space left before the word "discharge."

On October 1, 1924, the wife having remained continuously with her sister meanwhile, an identical printed form was adapted for what was called the "final" discharge of the wife, and other patients. In passing, to illustrate the danger of confusion that was likely to arise from the use of this form, the medical officer began to write the word "provisionally," but substituted the word "finally." It is, however, unquestionable that the wife was discharged, in the full sense of the word, on that date. It is equally unquestionable that the discharge did not involve any finding that she was recovered. There had in fact been no examination since the last renewal certificate dated July 7, 1922, which showed, with details that I need not quote, that she was suffering from delusional insanity. This disease may, of course, assume very aggravated forms or may be of the comparatively mild type with which the wife was afflicted. But the Court, if satisfied that unsoundness of mind exists in an incurable form, is not concerned with the degree of insanity, except in so far as this is to be inferred from the one test prescribed by the statute. A spouse may be a raving lunatic of the worst description and hopelessly incurable, but such unsoundness of mind is not a ground for divorce unless it has resulted in the prescribed detention or treatment. On the other hand a spouse whose incurable unsoundness of mind is of a very mild type does come within the statute, if the statutory test of "care and treatment" is fulfilled. This makes it all the more incumbent upon the Court to be sure that, in law, the statutory test is satisfied.

On July 2, 1926, for no other reason than that her sister found herself unable to keep the wife indefinitely, a fresh reception order was made. I have the evidence of Dr. Davie, who has been medical superintendent of the East Riding Mental Hospital since 1927. He told me that there had been virtually no change at all in the wife's condition from the date he took charge to the date of the hearing, and, as I have already said, he satisfied me that her condition of dementia, though by no means aggravated, was chronic and incurable. Since her reception in 1926 she has been released on many occasions. I have the last five orders before me. The first of these is dated December 21, 1933. They have one feature in common: they were all made in the week before Christmas

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Day. It is admitted that the making of the order had no reference to any improvement in the wife's mental condition, which, as I have said, was more or less constant throughout. The medical superintendent accepted the inference that it was the calendar which fixed the date of her departure from the asylum. There is another feature common to all these periods of absence. They vary in length, but the variation had nothing whatever to do with any deterioration in the wife's mental condition, nor did they depend upon any action of the authorities of the asylum. The date of her return depended simply and solely upon the convenience of her sister, and the sister's own state of health.

To come back to the form; save that the new title of the hospital is substituted for the old, the wording of the form is the same as in the earlier forms down to the words "now "detained in this mental hospital," but after the words "on trial," the words "to the next meeting of the Committee," printed on the old form, have been omitted and the following words substituted: "on trial from this mental hospital until we "make further order, or until the relapse of the patient, which-"ever should first take place." It is common ground in this case that on no occasion did the visitors make any further order, and it is plain that there was nothing which could be called the relapse of the patient. The only instance of an occasion which Dr. Davie faintly suggested might possibly be called a relapse, the development of a tendency to immerse articles in water, occurred, as his own renewal certificate of June 14, 1930, shows, before, and not, as he was mistaken in thinking, during, the relevant five years. Even so it is not suggested that this new feature was the cause of her return to the asylum.

In these circumstances I was naturally anxious to know how it came about that the wife was received back on five separate occasions without either of these conditions being fulfilled. The Solicitor-General frankly admitted that it was impossible to justify the use of this form.

As it happens she was released on December 23, 1932, and remained absent until April 21, 1933. I have not before me the order relating to this particular release, but I gather that it was identical in form with those to which I have just been referring. This means that she was in fact absent from the asylum on the date when the five years immediately preceding the presentation of the petition began to run in February, 1933, and so remained for at least two months thereafter. There was, as I have already said, an annual absence of greater or less duration in each of the five years. Mr. Barnard informed me that the total number of days of absence during the five years amounted to 346. Dr. Davie accepted, with some reluctance, the suggestion that these periods might be described as "absences on trial." To illustrate the confusion with regard to what was occurring, I will quote the entry in the hospital book relating to the absence beginning on December 23, 1932. It reads as follows: "She went out to-day on holiday to her sister, who will be "responsible for her. Discharged on trial. She is not any "better mentally." The corresponding entry on her return is: "She returned from being on trial to-day; there is no "change in her mental state."

There is no provision in the Act for sending asylum patients "on holiday." As I have already said, this is the phrase in current use in relation to private patients released from a hospital or licensed house for the benefit of their health under s. 55, sub-s. 3, of the Lunacy Act, 1890. She did indeed go to her sister, but there is no provision that her sister would be responsible for her. Nothing of the sort appears in the order, nor does any such provision appear in s. 55. She certainly was not "discharged," though I am asked to say that she was absent "on trial." The Solicitor-General frankly admitted, as I have said, that this misuse of the terms in the Lunacy Act could not possibly be justified, but invited me, nevertheless, to say that on all these occasions the wife was in fact allowed to be absent on trial for an unspecified period under s. 55, sub-s. 1. He laid stress on the point, to which I have already alluded, that among the forms in the Second Schedule, the use of which is permitted but not enjoined by s. 339, there is no form to meet this case, nor indeed are the

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visitors obliged to put their order in writing. He invited me, therefore, to hold that in substance, though not in form, the statutory provision relating to "absence on trial" had been complied with. He argued further that, as no period had been fixed beyond which the wife had outstayed her leave of absence by fourteen days, and there was no question of escape, the reception order was at all material times in force, and, therefore, that it was lawful for the authorities to receive her back at any time, notwithstanding that the conditions relating to a further order, or the relapse of the patient, whichever should first take place, had not been fulfilled. He invited me to ignore these words in the order, as being misconceived, if not actually ultra vires.

I think that I am entitled to accept this argument, more especially as I am satisfied, notwithstanding the confusion in Dr. Davie's mind, possibly due to his having been at one time, as I was informed, in charge of private patients, that absence on trial was what he really meant by "provisional discharge." That being so I hold that the reception order remained in force at all material times. I do hope, however, that this case will result in this local authority putting their house in order, for the argument has shown that they are running a considerable risk, in matters unconnected with the Matrimonial Causes Act, by reason of the confusion which prevails in relation to the exercise of their powers under the Lunacy Acts.

On the assumption that the reception order in this case was in force at all material times, I have now to consider the question of more general importance, whether the wife was continuously detained in pursuance thereof for the prescribed period. In substance, I am invited to say that the words "while he is detained in pursuance of" a reception order, in s. 3 of the Matrimonial Causes Act, 1937, are satisfied if a reception order is held to have been continuously in force for the prescribed period, in pursuance of which the wife was liable at any time therein to be received and detained in the East Yorkshire Mental Hospital, whether or not she was actually so detained throughout the whole of the period.

It goes without saying that this solution would be simple, and would relieve the Court of all the difficulties which arise, if detention in fact must be proved. Apart from the fourteen days after an escape, during which a reception order is in force, it has been seen, from what has gone before, that there are at least four varieties of permitted absence in the case of a lunatic in this asylum, namely :—

(*a*) Any temporary outing, unattended, during the time of day when patients are not locked in ;

(*b*) Leave of absence granted by the manager, under the regulations, for three nights or four days ;

(*c*) Absence on trial for a fixed period ; and

(*d*) Absence on trial for an indefinite period.

If detention in fact is requisite, it is obvious that these varieties of absence will require separate consideration. As at present advised, I should not be prepared to hold that detention would be interrupted by routine outings in the daytime, even though the only restrictions upon the movements of a patient were such as result from the limited time available. The second case, and the corresponding case of forty-eight hours' leave in the case of a private patient, obviously create more difficulty. I will assume, without deciding, that an occasional absence of this sort would not be held to interrupt the period of detention, on the de minimis principle. Even so, such absences might be so frequent that it would be impossible to disregard the accumulation of days of freedom during the five years' period. It may be that the very question is raised which Lord Coleridge C.J. answered in the *Mayor of Southport* v. *Morriss* (1), when he said "The "Attorney-General has asked me where we are to draw the "line. The answer is that it is not necessary to draw it at "any precise point. It is enough for us to say that the "present case is on the right side of any reasonable line "that could be drawn." Whatever may be the position as regards the first two classes of permitted absence, it seems to me that, if detention in fact is requisite, absence on trial for prolonged and indefinite periods must be on the wrong side of any reasonable line that could be drawn.

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(1) [1893] 1 Q. B. 359, 361.

As leading to the conclusion that detention in fact is intended, Mr. Barnard called my attention to the corresponding provisions of the Divorce (Scotland) Act, 1938. (1) As this point arose after the Solicitor-General had concluded his argument, I had not the advantage of hearing his views upon it. But, at the close of the adjourned hearing, I intimated that I should be willing to hear him further if he thought it desirable to address me upon the point. I have, however, received an intimation that he does not desire to do so. Now it is not usually safe to draw any conclusion about the construction of one Act of Parliament from the wording of another, more particularly if the Acts in question relate to different systems of law. But I think it would be foolish to ignore altogether a marked difference of wording in Acts passed in two successive sessions in relation to a subject upon which, as is notorious, public opinion in both countries was greatly exercised.

The material parts of the Act are as follows: The corresponding ground for divorce under s. 1, sub-s. 1 (*b*), is that the defendant is incurably insane. Sect. 6, the interpretation section, reads as follows:—

"6. (1.) In this Act the expression 'the Court' means "the Court of Session.

"(2.) In any action of divorce on the ground of incurable "insanity, the defender shall not be held to be incurably "insane, unless it is proved that he is, and has been for a "period of five years continuously immediately preceding the "raising of the action, under care and treatment as an insane "person, and where such care and treatment as aforesaid is "proved, the defender shall, unless the contrary is shown to the "satisfaction of the Court, be presumed to be incurably insane.

"(3.) A person shall be deemed to be under care and "treatment as an insane person—

"(*a*) while any order or warrant for his detention or "custody as a lunatic under the Lunacy (Scotland) Acts,

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(1) 1 & 2 Geo. 6, c. 50.

"1857 to 1919, the Army Act, the Air Force Act, the Naval "Discipline Act, the Naval Enlistment Act, 1884, or the "Yarmouth Naval Hospital Act, 1931, is in force;

"(*b*) while he is under care and treatment (other than "treatment as a voluntary patient) within the meaning of "section one hundred and seventy-six of the Supreme "Court of Judicature (Consolidation) Act, 1925, as amended "by the Matrimonial Causes Act, 1937;

"and not otherwise."

It will be observed that whereas sub-s. 3 (*b*) incorporates care and treatment under the English Acts, other than the treatment as a voluntary patient which is included by s. 3 (*b*) of the Matrimonial Causes Act, 1937, there is no reciprocal reference in the latter Act to care and treatment under the Lunacy (Scotland) Acts.

I have looked at the Scottish Lunacy Acts. There are obvious differences between the two codes, both in form and in substance. But whatever the differences, the two codes have one thing in common, they are both designed to regulate the care and treatment of lunatics. Seeing that continuous care and treatment of a lunatic spouse for the prescribed period is a condition of divorce in both countries, it might reasonably be expected that the definition of care and treatment in the respective Divorce Acts would be substantially identical; or at any rate, one might be tempted, in spite of a difference in the wording of the two definitions, to suppose that Parliament meant the same test to be applied in each case. But I find that, in respect of this very subject of permitted absence from an asylum, there is one important difference between the two codes, which, even if it stood alone, appears to be sufficient to account for the difference in the wording of the definitions of care and treatment, and to suggest that it must have been deliberate. By s. 6 of the Lunacy Acts (Scotland) Amendment Act, 1866, it is provided that: "In every case in which any lunatic or any person "who has entered an asylum for treatment under authority "of this Act is temporarily absent from the asylum or house "for his reception into which the order was given, or shall "escape from such asylum or house or from the care of the "officers thereof, such order shall remain in force in the same "manner as if such lunatic or person as aforesaid were not "absent or had not escaped: Provided always, that such "lunatic or person as aforesaid shall return or be brought "back to such asylum or house within a period not exceeding "twenty-eight days from the day on which he left or escaped "from such asylum or house, or within a period of three "months where such lunatic or person as aforesaid is accompanied by or remains under care of the officers or attendants "of such asylum or house."

On the other hand, under the English Lunacy code, the visiting justices can permit absence on trial for what might be substantially the whole of the current renewal period without affecting the validity of the reception order.

To summarize the application of the two codes to the facts of this case, even if the second reception order had survived earlier absences, it could not, under the Scottish Acts, have survived the period of absence from December 23, 1932, to April 21, 1933, and the crucial five years' period would never even have begun to run; while the point I have to decide would have been the same if the wife, instead of living with her sister for varying periods amounting in all to 346 days, had been permitted to be absent continuously for well over four years, and had lived with her husband throughout that time.

It may well be that Parliament was content to regard the subsistence of an order which would automatically be terminated by a break of even twenty-eight days as sufficient to satisfy the test of continuity of care and treatment, but was not content so to regard an order which might be in abeyance for an indefinite period. But, assuming that this difference in the definition of care and treatment was deliberate in relation to the English and Scottish lunacy codes, and that the resulting anomalies were inevitable, I feel obliged to point out that a very anomalous position may arise in connection, for example, with the Yarmouth Naval Hospital Act, 1931. This Act authorizes the detention of persons in the Royal Navy, the Royal Marines and the Reserves, who are of unsound mind and are otherwise qualified within the Act, in the Yarmouth Naval Hospital. Orders for such detention are included in the definition of care and treatment in both the English and Scottish Divorce Acts. The same "care and treatment" is given to naval personnel in need of it whether their domicil be English or Scottish. Yet in the one case detention in pursuance of such an order is requisite, while in the other the mere fact that the warrant or order is in force is sufficient to satisfy the definition of continuous care and treatment. With reference to such persons, at any rate, there appears to be no particular reason, if the two phrases mean the same thing, why one or other of them should not have been selected for use in both Acts.

But I do not wish to lay too much stress on considerations arising from a comparison with the Scottish Act. On the wording of the Matrimonial Causes Act itself I cannot bring myself to hold that the liability to be detained, if and when a reception order is called out of abeyance, is the same thing as actual detention under an order which is being enforced. I think that this can be tested by one more illustration derived from the facts of this case. So far as the medical superintendent was concerned, there was no "necessity" for the wife to be detained at all. Nothing could be done for her in the hospital beyond what he called "social treatment," and, if the wife was happier with her sister, the authorities were, perfectly properly, content that she should stay with her, if not indefinitely, at any rate, to quote Dr. Davie, "for a year if need be or more." There was never any medical necessity for her return to the asylum; such necessity as there ever was lay solely in the convenience of her sister.

By s. 55, sub-s. 8, which I have quoted above, before the expiration of a fixed period of absence on trial, and a fortiori if no period has been fixed, any medical man can send a certificate to the visitors certifying that the patient's detention as a lunatic is no longer necessary. The certificate does not involve that the patient has recovered, but only that detention

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is unnecessary. Upon the sending of the certificate the reception order ceases to be in force. The patient can no longer be retaken at the expiration of the period as if upon an escape. It does not matter how short the period of absence on trial was to be or whether the medical superintendent agrees with the opinion or not, for there is no question of his being allowed to examine the patient and give a renewal certificate under s. 7 of the Lunacy Act, 1891. As soon as a patent is out on trial, any medical man, however inexperienced in this subject, can bring a reception order to an end in this way. In a case like this it does seem absurd that the question whether a patient, to whom the asylum authorities are prepared to allow more or less indefinite leave of absence on trial, is or is not continuously under care and treatment, may depend on whether some doctor does or does not send a certificate to the visitors, with which, if it were sent, they would presumably be in complete agreement.

I have considered carefully whether any light is thrown upon the meaning of the words " detained in pursuance of "any order " in s. 3 (*a*) of the Matrimonial Causes Act, 1937, by para. (*b*) of the same section, whereby, in certain circumstances, treatment as a voluntary patient under the Mental Treatment Act, 1930, is also deemed to be " care and "treatment " within the former Act. Seeing that treatment as a voluntary patient excludes the idea of detention, as distinct from reception, in the mental hospitals and other places specified in s. 1, sub-s. 1, of the Mental Treatment Act, 1930, it is arguable that, if Parliament was prepared to regard this as " care and treatment " within the Matrimonial Causes Act, it must have intended the detention mentioned in para. (*a*) to be construed liberally. But it is to be observed that it is not any such treatment that is included in the definition, but only that " which follows without any interval "a period of such detention as aforesaid." That is to say, it applies only to one of the limited class of patients who, being detained under a reception order, is capable of submitting himself for reception, without any interval, in one of the places specified in the Act, and without the necessity of keeping the reception order in force. The converse case is dealt with by s. 2, sub-s. 3, of the Mental Treatment Act, 1930, which prescribes the circumstances in which a voluntary patient may be detained under a reception order. For the purposes of the definition of "care and treatment," it seems to me to be immaterial how many times a transition is effected from treatment as a voluntary patient to detention in pursuance of a reception order, and vice versa, provided always that a spell of such detention occurs not less than five years before the petition, from which a continuous period of care and treatment can be reckoned. But if in a varied course of treatment the earliest detention occurs within the five years' period, the definition is not satisfied. Moreover, even if such detention occurs outside the five years, it seems to me to be at least doubtful whether the continuity would not be broken, for example, if, less than five years before the petition, a period of treatment as a voluntary patient, within the meaning of s. 3 (*b*) were, by virtue of s. 2, sub-s. 3, of the Mental Treatment Act, 1930, to be followed by a period of reception and detention as a temporary patient under s. 5 of that Act, since such detention would not, in the first instance at any rate, be in pursuance of any order: see s. 5, sub-ss. 1, 3, 4 and 9 to 13, and compare s. 82 of the Lunacy Act, 1890, with the same section as modified by r. 47 of the Mental Treatment Rules, 1930. I have referred to these points in order to emphasize the arbitrariness of the definition of "care and treatment," which, in terms, is exclusive. In my opinion this strictly limited reference to treatment as a voluntary patient serves rather to mark the contrast between the words "treatment" and "detention." If Parliament had intended to take as the test any kind of care and treatment under the Lunacy Act, whether the spouse was a voluntary patient, a temporary patient, or a patient under a reception order, it would have been simple to say so. But as Parliament has not chosen to say so, it is not for the Court to legislate.

Moreover detention as a lunatic, not justified by the Lunacy Acts, gives rise to an action for false imprisonment: *Harnett*

v. *Bond.* (1) I am unable to see how a plaintiff, whatever other cause of action he might have, could allege false imprisonment in respect of a period when he was in fact at large by permission. However that may be, I think that strong support for the view that periods of absence on trial are not periods of detention within the meaning of the Lunacy Acts is to be derived from the speeches of the noble Lords in the case of *Harnett* v. *Bond.* (1) In that case the plaintiff was a private patient and was ordered twenty-eight days' absence on trial under s. 55, sub-s. 3 (*b*). The false imprisonment alleged was in respect of his being retaken during that period and his subsequent detention for a long period. The form of order for his absence is set out in the speech of the Lord Chancellor (2). Mutatis mutandis it would afford an excellent model for the guidance of the East Riding of Yorkshire. With regard to the power of retaking the patient under such an order, nothing turns on the distinction between a private patient in a licensed house and a patient in an asylum. In expressing the opinion that this power was capable of being exercised wherever the patient might be found Lord Cave said: "When once the patient is retaken the "leave of absence order comes to an end and he can be "detained under the existing reception order."

Lord Dunedin, summarizing the facts, said (3): "Mr. "Harnett was detained in a private asylum under a "reception order against which nothing has been said. He "was liberated for a period of twenty-eight days on trial "under a leave of absence order signed by two visiting "justices, but with a proviso authorising the medical officer "at any time during the twenty-eight days to take back the "patient if his mental condition required it. Being out of "the asylum in virtue of the leave of absence order he of his "own accord presented himself at the office of Dr. Bond. "He saw Dr. Bond who, having identified his case on the file, "knew that he had come from Malling Place. He considered "him to be in a very excited state, and thought it would be

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(1) [1925] A. C. 669.
(2) Ibid. 676.
(3) Ibid. 686.

"well that Dr. Adam should see him. He telephoned to that "effect, and a motor-car with two attendants was sent to "take him to Malling Place. Pending the arrival of the car "Harnett was forcibly detained. For that detention it is "admitted Bond had no legal justification." Every word of this passage seems to me to be inconsistent with the notion that, while he was absent under the leave of absence order, the plaintiff was detained in pursuance of the reception order.

Lord Buckmaster said (1): "On December 12, thinking "the plaintiff sufficiently restored to justify his release "upon a probation order, the plaintiff was permitted to "leave the establishment in company with his brother. "The brother, however, was not responsible for his safe-"keeping, nor was the plaintiff placed under his control." That, in substance, is this case. Describing the legal effect of the release, Lord Buckmaster said (2): "When once "it be accepted that such an order is in the nature of "an experiment to try whether a man is fit to be restored "to complete liberty, it appears to me to follow that the "powers conferred by the reception order, including complete "control of the person named in the order, are merely in "abeyance, and at any time if the custodian honestly thinks "it is in the interest of the patient, the control can be resumed "and the patient taken back."

There are other passages to the same effect, but it is unnecessary to multiply quotations. For these reasons I hold that the plaintiff has not established a case under the section, and the petition must, therefore, be dismissed.

Solicitors: *Bell, Brodrick & Gray, for Woodhouse & Son, Hull; Burton, Yeates & Hart, for Brown & Pinkney, Bridlington; the King's Proctor.*

(1) [1925] A. C. 688. (2) Ibid. 690.

W. L.

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Jan. 17.

GIBBS-SMITH *v.* GIBBS-SMITH.

Divorce—Desertion—Wife's petition for dissolution of marriage—Previous petition filed by wife but never served—Continuing desertion—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*), *as amended by Matrimonial Causes Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2.

Where a spouse presents a petition for divorce on the ground of alleged adultery and it remains on the file of the Court, though never served on the respondent, such petition does not prevent desertion by the respondent from continuing to run, and the petitioning spouse is entitled, on a fresh petition, to a decree of divorce on the ground of desertion without cause for a period of at least three years immediately preceding the presentation of the fresh petition, notwithstanding that the previous petition has remained on the file until within a few days before the fresh petition is presented.

Marthews v. *Marthews* [1939] P. 97 distinguished.

WIFE'S UNDEFENDED SUIT for divorce on the ground of desertion.

The parties were married in October, 1930. The wife presented a petition for divorce on the ground of the husband's alleged adultery in August, 1935. That petition was never served, and it was dismissed on the wife's application on July 1, 1938. Her present petition alleging desertion under the Judicature (Consolidation) Act, 1925, s. 176 (*b*), as amended by the Matrimonial Causes Act, 1937, s. 2, was filed on July 11, 1938, and served on July 26, 1938, on the respondent.

J. B. Blagden for the petitioner.

1939. Jan. 17. HENN COLLINS J. There is no question in this case that there was desertion, certainly from July, 1932, subject only to the fact that on August 27, 1935, the present petitioner filed a petition for divorce from her husband. The question is whether the fact that that petition remained upon the file until July 1, 1938, had the effect of suspending for those three material years the desertion which would otherwise have been completed,

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The petition was, in fact, never served, and I think that that fact distinguishes this case from *Marthews* v. *Marthews* (1) and the cases that followed it, in that the mere filing of a petition, not followed by service, does not suspend the existing obligation between the spouses to cohabit, and, therefore, it has not interrupted the desertion. In this case the petitioner has proved all that is necessary—namely, desertion for three years immediately preceding the date of the petition.

His Lordship pronounced a decree nisi, with costs, and in response to a request by counsel that the decree absolute might be expedited, subject to the King's Proctor raising no objection, said that he thought that it was a proper case for such an application to be made.

Solicitors: *Greene & Underhill.*

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(1) [1939] P. 97.

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JACKSON *v.* JACKSON OTHERWISE PRUDOM.

Nullity of marriage—Evidence—Husband's petition—Pregnancy of wife by another man alleged—Child born a few days after marriage—Husband's evidence as to date of access before marriage—Admissibility —Rule in Russell v. *Russell—Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 7, *sub-s.* 1 (*d*), *and proviso—Matrimonial Causes Rules,* 1937 (*St. R. & O.* 1937, *No.* 1113/*L.* 14), *r.* 6, *sub-r.* 2 (*b*).

The rule in *Russell* v. *Russell* [1924] A. C. 687 that a spouse may not give evidence tending to bastardize a child born in wedlock does not apply where a husband seeks, on a petition for nullity on the ground that the wife was pregnant by another man at the time of the marriage, to give evidence of non-access at a material date before the marriage.

The *Poulett Peerage* case [1903] A. C. 395 followed.

HUSBAND'S DEFENDED PETITION for nullity of marriage on the ground that the respondent wife was pregnant by another man at the time of the marriage, pursuant to the Matrimonial Causes Act, 1937, s. 7, sub-s. 1 (*d*). (1)

Mr. Arthur Jackson, of Sneaton Thorpe, Yorkshire, by his petition dated February, 1938, sought the dissolution of his marriage, which took place at Whitby registry office, on January 24, 1938, on the ground that his wife, then Kathleen Prudom, spinster, was pregnant at the time of the marriage by a man other than himself. The respondent gave birth to a child on January 29, 1938, and by her answer she denied the charge and claimed that the petitioner was the father of her child. The child died in July, 1938.

An argument arose on objection being taken to certain questions proposed to be put to the petitioner by his counsel

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(1) The section provides: "In "addition to any other grounds "on which a marriage is by law "void or voidable, a marriage shall "be voidable on the ground— ". . . . (*d*) that the respondent "was at the time of the marriage "pregnant by some person other "than the petitioner: Provided "that . . . . the court shall not "grant a decree unless it is satisfied—(i.) that the petitioner was "at the time of the marriage "ignorant of the facts alleged; "(ii.) that proceedings were instituted within a year from the "date of the marriage; and (iii.) "that marital intercourse with the "consent of the petitioner has not "taken place since the discovery "by the petitioner of the existence "of the grounds for a decree."

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relating to the question of non-access at material dates before the marriage.

Streatfeild K.C. and *Geoffrey Tyndale* for the petitioner. The rule in *Russell* v. *Russell* (1) has never been applicable to nullity suits based on incapacity, where necessarily there could be no children of the marriage. The decree acts retrospectively in pronouncing that there was no marriage, and it follows that in that class of case there could be no lawful issue. The form of s. 7 of the Matrimonial Causes Act, 1937, makes the evidence of the husband essential on the question of access before the marriage. The matter is dealt with in Latey on the Matrimonial Causes Act, 1937, at p. 38. In *Farnham* v. *Farnham* (2), where the woman respondent was found frigida quoad hunc, Langton J. pointed out that in laying down the rule in *Russell* v. *Russell* (1) their Lordships did not contemplate its possibilities in nullity suits. In *Burgess* v. *Burgess* (3) Bucknill J. admitted the evidence of a wife petitioning for nullity that she was pregnant by another man. In *The Poulett Peerage* (4) Sir Robert Finlay A.-G. for the Crown submitted that evidence similar to that which it was proposed to adduce here was admissible, and opposing counsel argued very strongly the other way, basing himself on a decision of Sir John Romilly in *Anon.* v. *Anon.* (5) Lord Halsbury L.C., however, refused to admit the authority of that case, and the evidence was received. There are passages in *Russell* v. *Russell* (1) which suggest that the rule is inapplicable in a case like the present one, and there have been decisions since 1924 which have excluded the rule in divorce suits in certain circumstances: see Browne and Latey on Divorce, at p. 289. I also pray in aid r. 6, sub-r. 2 (*b*), of the Matrimonial Causes Rules, 1937 (6), whereby an oath has to be made in support of the petition which would be inadmissible if the rule applied.

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(1) [1924] A. C. 687.
(2) [1937] P. 49.
(3) [1937] P. 60.
(4) [1903] A. C. 395, 397, 398.
(5) (1856) 23 Beav. 273.
(6) This rule provides that in the case of a petition for nullity under s. 7, sub-s. 1 (*b*), (*c*) and (*d*), of the Act of 1937, the affidavit in verification shall state inter alia whether the petitioner was at the time of the marriage ignorant of the facts alleged and whether marital intercourse with

Victor Williams for the respondent. No evidence by either of the spouses should be admitted which has the effect of making the offspring of the marriage appear spurious. That was in substance the decision in *Russell* v. *Russell* (1), and it merely confirmed the principle enunciated by Lord Mansfield in *Goodright* v. *Moss.* (2) The *Poulett Peerage* case (3) was distinguishable, because there the husband denied having access at all to the wife before marriage, whereas here it was only a question of the date when there was access before marriage; moreover Lord Halsbury in his speech reaffirmed the rule in *Goodright* v. *Moss* (2), and said: "It most wisely "and properly protects the sanctity of married intercourse." Sect. 7, sub-s. 1 (*d*), is so framed that it puts on the petitioner the onus of proving affirmatively that the respondent had intercourse before marriage with another man at the material date. This is a question of public interest, and I submit that the rule in *Russell* v. *Russell* (1) applies.

1939. Feb. 3. HENN COLLINS J. Certain questions have been formulated by Mr. Streatfeild, on behalf of the petitioner, which he proposes to put to the petitioner; but an objection has been raised on behalf of the respondent wife on the ground that the answers would tend to bastardize the child born since the marriage. That that is the tendency of all four questions is undoubted, and the question I have to answer is whether the rule in *Russell* v. *Russell* (1) constrains me to exclude those questions. I propound the matter for my solution in those terms because the frame of the section under which this question arises is such as to predispose me to the view that the evidence ought to be admitted unless the rule of law excludes it.

The section under which it arises is s. 7 of the Matrimonial

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the consent of the petitioner has taken place since the discovery by the petitioner of the existence of the grounds for a decree.

(1) [1924] A. C. 687.

(2) (1777) 2 Cowp. 591, 592, 594.

(3) [1903] A. C. 395.

Causes Act, 1937, which provides, in addition to any other ground for which a marriage may be void or voidable, that a marriage shall be voidable on the ground (*d*) that the respondent was at the time of the marriage pregnant by some person other than the petitioner. It goes on to provide that among other cases provided by (*d*) the Court shall not grant a decree unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged, that is to say, ignorant of the fact that at the time of the marriage the wife was pregnant by some person other than the petitioner. As I pointed out in the course of the argument, the section proceeds on an assumption of pregnancy which must itself involve the assumption of the wife having had connection with some male person, and it therefore puts upon the petitioner the obligation of proving what is in effect a negative, that that male person was not himself. In the circumstances in which persons about to marry find themselves one would expect to find all the evidences of desire and opportunity from which in cases of divorce one would be inclined to infer adultery. It must therefore be an extraordinarily difficult proceeding for any petitioner under that section to establish by any evidence but his own that he was not the person responsible. For these reasons, and for some others that Mr. Streatfeild urged upon me, my predisposition is to find that there is no rule of law excluding the kind of evidence which the questions propounded are intended to elicit, but of course my predisposition in the matter has no weight at all if the authorities are against it.

Therefore I look critically at the judgments in *Russell* v. *Russell* (1), which is the most authoritative exposition of a rule of law which has existed for a very long time in the history of our jurisprudence, and I think that that case does not exclude the questions which it is proposed to ask the petitioner. I think that perhaps the most succinct epitome of the statement of the rule is found in the speech of Lord Finlay (2). I cannot think that by any inadvertence such a master of precise exposition as was Lord Finlay used

(1) [1924] A. C. 687. (2) Ibid. 711.

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terms which confined the rather general terms in which Lord Mansfield expressed it in the earlier case of *Goodright* v. *Moss.* (1)

The summary which Lord Finlay gives is this: "It is "beyond controversy that by the common law of England "neither husband nor wife could give evidence of non-access "after marriage for the purpose of showing that a child of the "wife born during the marriage was illegitimate." The significance of that is that it is confined to non-access after marriage. The particular question which arises in this case is whether a husband can give evidence as to non-access before a particular date before marriage. I do not think that the rule in *Russell* v. *Russell* (2), as defined by Lord Finlay, covers the kind of evidence which it is now proposed to tender.

It is quite clear, I think, also when you look at the *Poulett Peerage* case (3), that that is the proper limitation of the rule. Lord Halsbury, then Lord Chancellor, says in his speech (3): "The question is whether it is possible for a "husband to be asked whether he had intercourse before "marriage with the woman who afterwards became his wife. "I confess I should be startled if I thought that that which "appears to have been in the mind of Sir John Romilly at "the time he gave the decision referred to (4) could be held "to be the law of England. Is it conceivable that a man "taking to wife a person whom he imagined to be a pure "virgin, and finding out that he had been deceived and that "the woman was pregnant when he married her, should not "be at liberty to say afterwards that, so far as he was concerned, "he had every reason to believe that she was a virgin; and "that, having spurious issue put before him, he should not be at "liberty to say, 'I never had intercourse with my wife before "'marriage'?" He is there saying that a husband may give evidence that he was not the father of a child conceived before marriage. That is precisely the purpose of the questions, with this distinction, that here the questions do not go the length of saying: "I never had intercourse with

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(1) 2 Cowp. 591, 592, 594.
(2) [1924] A. C. 687.
(3) [1903] A. C. 395, 398.
(4) *Anon.* v. *Anon.* 23 Beav. 273.

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"the woman before marriage," but "I never had access "before the named date."

I therefore think that these questions are admissible. I do not think that in these circumstances it is necessary for me to deal with the other branch of the argument—namely, whether this question arises at all in a nullity case, and as anything I say in those circumstances would be obiter I propose to say nothing. I am not dissenting from Langton J. in *Farnham* v. *Farnham*. (1) I make that clear. I do not think that it arises.

Counsel then put the proposed questions to the petitioner.

1939. Feb. 7. The evidence having been completed, HENN COLLINS J. pronounced a decree nisi of nullity.

Solicitors: *Reed & Reed, for Colin Brown & Kidston, Whitby; Fielder, Le Riche & Co., for King & Thompson, Middlesbrough.*

(1) [1937] P. 49.

W. L.

C. A.
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THE ABODI MENDI.

Shipping—Action in rem for possession of Spanish ship—Arrest—Discontinuance of action—Master refused access to ship—Summons by plaintiffs for order for removal of warrant of arrest—Cross-summons by defendants for order for reinstatement of master—Contempt of Court—R. S. C., Order XXIX., *rr.* 1, 2, 6, 8*—Practice.*

On April 13, 1938, the plaintiffs, the Republican Government of Spain, who claimed to have requisitioned a Spanish ship, issued a writ in rem against her and her "late" master, claiming possession, and she was duly arrested at Cardiff by the Admiralty Marshal. The owners and the captain, who described himself as the "present" master, entered an unconditional appearance; the Nationalist Government of Spain, who also claimed to have requisitioned the ship, entered a conditional appearance.

On October 4 the plaintiffs gave notice of discontinuance of the action and on October 14 issued a summons asking that the warrant of arrest might be removed. On October 15 the defendants signed consents to the release, but on the same day the captain left the ship for a walk, and on his return found that the crew had removed the gangway. He was thus in fact prevented by force from returning on board; and this prevention continued during the proceedings which followed. The owners thereupon withdrew their consent to the release, and issued a summons, which the Nationalist Government supported, for an order for the reinstatement of the master on board the ship.

In reply to this summons the plaintiffs filed affidavits (inconsistent with their earlier affidavits in which it had been stated that the master refused to deliver up the ship to the plaintiffs and was about to sail her to an unknown destination) to the effect that the captain had been dismissed from the post of master, and that a new captain and the crew had been in continuous possession of the ship on behalf of the plaintiffs from a date prior to the issue of the writ for possession:—

The President held (i.) that as regards the defendants' summons, without deciding the rival claims of the Nationalist and Republican Governments to the right to the control of the ship (a controversy which it was not for the Court to decide), it was impossible to hold that the Admiralty Marshal should concern himself to take steps to ensure that the defendants' master should have free right of access to the ship; that at most the marshal could only invoke the assistance of the police, which the parties could do for themselves; and that the summons must be dismissed.

(ii.) That as the right to arrest in an action in rem for possession was based upon an allegation that the ship was in the possession, or at least under the control, of some one else, the claim for possession and the warrant of arrest (having regard to the plaintiffs' later affidavits) were wholly misconceived and perilously like an abuse of the process of the Court; that under the rules of Order XXIX., which dealt with releases in Admiralty, when an appearance had been entered, a party at whose instance the arrest has been effected could not obtain a release merely at his own instance; that an order of the Court was required; and that in the circumstances it would not be just to allow the plaintiffs to obtain possession of the ship forthwith; and that the arrest would be continued until the position of the Nationalist Government was finally determined by the appeal to the House of Lords in *The Arantzazu Mendi* (ante, p. 37) then pending, unless meanwhile the Court was satisfied that the interests of all parties would be safeguarded as, for example, by the peaceful reinstatement of the master. On appeal:—

Held, that both orders should be discharged; that the forcible exclusion of the master appointed by the owners constituted a contempt of Court; that once the ship was put into the charge of the marshal all persons concerned in the litigation were under a duty to abstain from any interference with the custody of the ship by the marshal; and that the order would be that on production to the registrar of an affidavit by the plaintiffs' solicitors that the master had been permitted to return on board, and was on board, there would be liberty to the plaintiffs or the defendant shipowners to extract the release from the registry.

Per Clauson L.J. That the practice of the Admiralty registry under Order XXIX. not to allow a release to issue when an appearance has been entered, notwithstanding that the plaintiff has discontinued his action, until the consent of the defendant has been produced, is correct.

TWO SUMMONSES adjourned into Court for judgment.

The first summons, taken out by the plaintiffs, the Republican Government of Spain, was for an order that the warrant of arrest placed on the steamship *Abodi Mendi* in an action in rem for possession should be set aside on the ground that they had discontinued the action.

The second summons, taken out by the defendants, the owners of the *Abodi Mendi,* was for an order for the reinstatement of the master on board the ship.

The facts and arguments, which were heard in Chambers, are fully set out in the judgment.

G. St. C. Pilcher K.C. and *Owen Bateson* for the plaintiffs.

Gordon Willmer for the defendants.

J. V. Naisby for the Nationalist Government of Spain, who had entered a conditional appearance to the writ.

1938. Dec. 9. THE PRESIDENT (SIR BOYD MERRIMAN) read the following judgment: On April 13, 1938, the Government of the Republic of Spain issued a writ against the vessel *Abodi Mendi* and against Captain Aguirre, expressed to be the "late" master of the said steamship, for possession of the vessel. As the result of a præcipe in the prescribed form praying a warrant to arrest the ship, supported by an affidavit by Mr. Stevens, a partner in the firm of the plaintiffs' solicitors, both dated on the same day, the vessel was arrested at Cardiff by the Admiralty Marshal, and the warrant of arrest, duly endorsed, was lodged in the Admiralty registry.

On April 22 the owners, a Spanish company, and Captain Aguirre, calling himself the "present" master, entered an unconditional appearance to the writ. On April 25, solicitors on behalf of the Nationalist Government of Spain entered a conditional appearance, without prejudice to any application to set aside the writ and the arrest.

On October 4, the proceedings meanwhile having stood over generally by consent, the solicitors for the plaintiffs, the Republican Government, gave notice of discontinuance of the action. The owners on October 15 signed a consent to the release of the vessel. On the previous day the plaintiffs had issued a summons asking that the warrant of arrest might be removed and that the marshal's fees from October 4 until the date of release be paid by the defendants. This summons was returnable on October 18. Meanwhile Captain Aguirre, whether as "late" or "present" master—it is plain that these epithets epitomize the contest between the rival factions in Spain—left the ship for a walk. On his return he found that the crew had removed the gangway, and he has since been prevented from returning on board. On learning of this event the owners withdrew their consent to the release.

On the hearing of the plaintiffs' summons before me on October 18 it was submitted on behalf of the plaintiffs that, as they had discontinued their action, consent on behalf of the defendants was unnecessary, and that I had no option but to order the release forthwith. Mr. Pilcher expressly admitted, however, that, if any consent on the part of the defendants was necessary, it was open to the defendants to withdraw it on the ground that there had been a change of circumstances before the consent was acted upon.

In these circumstances the summons was adjourned without prejudice to any right the defendants might have to take out a caveat against the release of the vessel; it being understood the status quo should be maintained pending the adjournment.

On October 20 the solicitors for the owners issued a summons for an order for the reinstatement of Captain Aguirre on board the vessel. On the return of this summons before the registrar, the plaintiffs objected that this was an attempt to change the status quo, as he had not been on board the vessel at the time when I adjourned their summons. Thereupon the registrar, very properly, referred the owners' summons to me, and both summonses came on together on November 7.

In the owners' summons affidavits were read on both sides. They raise highly controversial issues, and if I were to decide these, as I certainly do not intend to do, I should be obliged, in substance, to decide the rival claims of the Nationalist and Republican Governments of Spain to the direction of this line of steamships, registered in the port of Bilbao.

Although the question whether the arrest of this vessel involves the impleading of a sovereign state has not yet actually arisen in this case, the general background of the controversy is summarized in the recent judgment of Slesser L.J. in the Court of Appeal in *The Arantzazu Mendi.* (1) Mutatis mutandis, the Lord Justice summarizes in substance, if not in detail, the history of this vessel also.

But I must refer specifically to the controversy which rages round the person of Captain Aguirre. To the affidavit of Mr. Zubizarreta, filed on behalf of the owners, is exhibited Captain Aguirre's complaint to the Glamorgan constabulary with regard to his being prevented from returning on board the vessel, which he describes as "my steamer," by certain ex-members of the crew who have remained on board against the wishes of her registered owners. The letter continues: "It is my "duty to remain on the steamer to continue my duties for "the registered owners of the steamer by whom I have been "appointed, but I fear intimidation and I beg of you to render "me the necessary assistance." On the other hand the affidavits filed on behalf of the plaintiffs set out, with a wealth of detail to which I shall have more particularly to refer, the circumstances relating to requisition by the Republican Government, summarized in the judgment to which I have already referred, and stating categorically that Captain Aguirre was dismissed from the office of master on April 4, 1938, and that Captain Aldamiz was duly appointed in his stead by the Spanish Consul in Cardiff, that is to say, nine days before the writ in this action, and that he, Aguirre, has never acted as master since then. The substance of the matter, I need scarcely say, is that Captain Aguirre's views on current controversies in Spain coincide with those of the owners, who, I gather, are in sympathy with the Nationalist Government. So long as Captain Aguirre was in charge, the owners were indifferent as to the arrest (indeed they may even have been content with it, as tending to preserve the ship from passing effectively into the control of the Republican Government under the requisition, or from even more serious dangers). On the other hand, if the plaintiffs could by any means ensure that only those remained on board the ship who were in sympathy with them, it would obviously be to their advantage to release the ship from the arrest, which they themselves had effected, in order that she might be at their disposal.

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(1) Ante, pp. 37, 40.

In these circumstances Mr. Willmer asks me to direct that the marshal be empowered to take such steps as in his discretion he thinks fit, to ensure that Captain Aguirre shall have free right of access to the ship. This submission, I need scarcely say, was supported by Mr. Naisby, appearing on behalf of the Nationalist Government. Neither counsel, however, was able to give me any authority justifying the making of such an order. Mr. Willmer pointed to the duty of the marshal to keep the ship under safe arrest and argued, as I think rightly, that this was for the benefit of whom it might concern, including, of course, the owners. He maintained that to substitute a disobedient and disloyal master for one who was in sympathy with the owners was analogous to rendering a ship unseaworthy by having an incompetent master on board. Now it is obvious that imperfect sympathy between a master and his owners on subjects of political controversy may arise from a change of opinion on the part of the owners or of the master, or both. Moreover coats may be turned more than once. It seems to me that it would be quite impossible to hold that the Admiralty Marshal is to concern himself with considerations of this sort. At the most he could only invoke the assistance of the police, and this the parties can do for themselves. Nor do I see how this Court could come to the conclusion that it was proper to order him to intervene in this matter without deciding the very controversies which, as I have already said, are not for this Court to decide. Unless Captain Aguirre was lawful master of the vessel at the time of the arrest on April 13 there could, even if Mr. Willmer's argument is accepted, be no ground for ordering his reinstatement for the purpose of protecting the res. But this depends, among other things, upon whether the requisitioning of this ship by the Republican Government and the dismissal of Captain Aguirre, purporting to be founded on the requisition, were, respectively, valid or invalid, since both these events are alleged to have occurred before the arrest of the ship. The defendants' summons, therefore, must be dismissed, but without costs.

I now turn to the plaintiffs' summons. The affidavit of their solicitor, Mr. Stevens, in support of the præcipe leading to the warrant, after referring to the requisition by the Republican government and to the dismissal of Captain Aguirre from his post as master, stated that Captain Aguirre was about to sail the vessel from the port of Barry to some destination unknown to the plaintiffs, against their will and without their consent, and that he refused to deliver up the said vessel to the plaintiffs. In a second affidavit, dated

October 14, in support of the summons to effect the release, Mr. Stevens said that, as his clients had obtained possession of the vessel, they instructed him to discontinue the present proceedings, which he did by notice of discontinuance on October 4, 1938. I pause here to observe that it is common ground that Captain Aguirre was on board the vessel up to and including October 4, and there is nothing whatever on the face of these proceedings to show that from the time of his alleged dismissal on April 4 to the discontinuance of the action on October 4, anything had occurred to effect any change, one way or the other, in the possession of the vessel. It is, of course, possible that the political sympathies of a sufficient majority of the crew may have changed in the meanwhile. Indeed, something of the sort is suggested by Mr. Stevens' third affidavit of October 21, in which, after enumerating the crew on board the vessel and saying that they are paid on behalf of the Republican Government, he goes on to state: "There are two other persons who are now "or were lately on board, namely, the late master, Don "Bonifacio Aguirre, and the steward, both of whom have "refused to acknowledge the authority of the Mid Atlantic "Shipping Company Limited [agents for the Republican "Government] or of the Government of the Republic of Spain "through its consular officer." He also swears that since the dismissal of Captain Aguirre from the post of captain on April 4, 1938, "he has ceased to take any active part in the "control of the vessel, but has permitted this to be exercised "by the present captain, Don Epifanio Aldamiz, without "disturbance, the orders of which captain the men now on "board, with the exception of the steward, have obeyed "since April 4, 1938." This, of course, is quite inconsistent with Mr. Stevens' first affidavit, and, if it is true, it seems to me that the claim for possession and the warrant of arrest were wholly misconceived. The right to arrest in an action for possession is based upon an allegation that the vessel is in the possession of, or at least under the control of, some one else: see R. S. C., Order v., r. 16, and the specimen affidavit No. 14 in Appendix A of the Rules of the Supreme Court.

This view of the matter is, if possible, made still plainer by the affidavits of Captain Aldamiz and Mr. Cabadas, the Spanish Consul at Cardiff. In paragraph 5 of the former affidavit Captain Aldamiz says that since April 4 he and the crew on board the steamship *Abodi Mendi* have been in continuous possession of the vessel on behalf of the Republican Government of Spain; and in paragraph 12 he says: "Ever "since April 4, 1938, when he [Captain Aguirre] was dismissed "from the post of captain, although Captain Bonifacio Aguirre "has remained on board the vessel, I have been the master, and "have acted as the master, and the said Bonifacio Aguirre had "never acted as master or given any orders or taken any part at "all in the control or command of the vessel; I have given "all orders without disturbance of any kind." The same in substance is the effect of paragraphs 15 and 16 of the affidavit of the Spanish Consul.

In these circumstances, this action and the consequent arrest seem to me to be perilously like an abuse of the process of the Court, and the circumstances in which Captain Aguirre has ceased to be physically on board the vessel appear to confirm this view. Nevertheless Mr. Pilcher and Mr. Bateson say that I have no option but to order the instant release of this vessel, and Mr. Bateson went so far as to argue that this followed, a fortiori, if the action was in fact wholly misconceived. I do not think that this is the position under the Rules of Court. Releases in Admiralty actions are dealt with by Order XXIX. Rule 1 provides that the property arrested by warrant shall only be released under the authority of an instrument issued from the registry, to be called a release. By r. 2 a solicitor, at whose instance any property has been arrested, may, before an appearance has been entered (I emphasize those words), obtain the release thereof by filing a notice that he withdraws the warrant. On the other hand by r. 3 a solicitor may obtain the release of any property by paying into the registry the sum in respect of which the action has been commenced. It has been decided that this sum includes a sum to cover the costs. I need not refer specifically to rr. 4 and 5 relating respectively to arrests in respect of freight and salvage, but r. 6 is important, as it is the only rule laying down the circumstances in which the solicitor shall be "entitled to" a release, which again, excluding the provisions relating to a salvage action, are that he shall have filed a bail bond in the sum in respect of which the action has been commenced or paid such sum into the registry, unless there be a caveat against the release thereof outstanding in the caveat release book. The latter proviso relates to r. 8, whereby a party desiring to prevent the release of any property under arrest shall file in the registry a notice, and thereupon a caveat against the release of the property shall be entered in a book to be kept in the principal registry, called the caveat release book. Entering a caveat is clearly the appropriate procedure for third parties who have a claim against the ship, and in this very case a caveat was entered under r. 8 by third parties on October 12 and withdrawn on October 14. It is unnecessary to decide whether it is ever the appropriate procedure on behalf of a party to the action who has entered an appearance but has no counterclaim.

In my opinion, in a case like the present, where the owners at any rate have entered an unconditional appearance, the wording of r. 2 is intended to make it clear that, where an appearance has been entered, the solicitor for the party at whose instance the arrest has been effected cannot obtain a release merely at his own instance. In other words an order of the Court is required unless by virtue of Order LII., r. 23, which is of general application, the Admiralty registrar allows an agreement in writing between the solicitors to be filed and become an order of the Court, as he may do if he thinks it reasonable and such as the judge would, under the circumstances, allow. I have looked at the Admiralty Rules of 1859. In substance, rr. 46 to 52 inclusive, relating to releases, are the same as the present rule; and I am advised that it has been the invariable practice in the registry throughout the whole period to require a consent to the release when an appearance has been entered. In most cases the consent is given as a matter of course; but there may well be cases in which it is necessary to safeguard the position of a defendant ; and I think that this case affords an excellent example.

It seems to me to follow from the provisions of Order XXIX., r. 1, that the Court must have some discretion whether or not to order the release. I do not think that it would be just to allow the plaintiffs to obtain possession of this vessel forthwith by methods such as I have described. They invoked the peculiar jurisdiction in rem of the Admiralty Court, thereby securing that this vessel should be detained until subsequent events should put them in effectual control of the vessel. Upon these events occurring they discontinued the action, and ask the Court to order the release of the vessel. In substance, under cover of the arrest and the release combined, they seek to make their claim to possession effective without obtaining judgment in their favour. But if, after the release has been ordered, the defendants in their turn were to claim possession and to arrest the ship, it is clear that, so long as the concurrent judgments of this Court and the Court of Appeal in *The Arantzazu Mendi* (1) stand, the present plaintiffs could get that writ and arrest set aside at once. On the other hand I do not think that the Court ought to prolong the arrest indefinitely, particularly if it is settled that the Nationalist Government is a sovereign state and so can resist being impleaded. I understand that an appeal to the House of Lords against the judgment of the Court of Appeal in *The Arantzazu Mendi* (1) is contemplated. I think that the arrest should be continued until the position of the Nationalist Government in our Courts is thus finally determined. The plaintiffs' summons will stand over for further consideration when the decision of the House of Lords is known, unless meanwhile the necessary consents to the release are given, or the Court is otherwise satisfied that the interests of all parties are safeguarded, for example, by the peaceful reinstatement of Captain Aguirre on board the vessel. There will be liberty to apply at any time.

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(1) Ante, p. 37.

The plaintiffs appealed and the defendants cross-appealed. The appeals were heard on February 20, 21, and 22, 1939.

G. St. C. Pilcher K.C. and *Owen Bateson* for the appellants, the Republican Government of Spain. When an action for possession has been discontinued, the practice of the Admiralty registry requiring a consent by the opposite parties before a ship is released, is not sanctioned by any rule. There is no discretion to withhold release or to require a consent except in those cases where a consent is necessary as a matter of business, e.g., in cases when bail has been given and there may be a question as to its sufficiency. In the present case, when the action was discontinued on October 4, the plaintiffs were entitled to an immediate release; there is no rule of Court requiring a consent by defendants when it is their own ship which has been arrested against their will. They could, however, if so minded, have filed a caveat against the release under Order XXIX, r. 8, and this they did not do.

If it be right that even in a possession action the consent of the defendants is necessary before the release is granted, there was no reasonable ground on October 4 for the consent being withheld. The learned President's order standing over the plaintiffs' summons for release until after the result of the appeal to the House of Lords in *The Arantzazu Mendi* (1), it is submitted, was not justified. The result of that case could have no bearing on an action which had been wholly discontinued. The appeal should be allowed with costs, such costs to include the marshal's expenses from October 4 until the date of release; the plaintiffs should not be penalized because, apparently, the defendants do not want the ship released.

Sir Robert Aske K.C. and *J. V. Naisby* for the respondents, the Nationalist Government of Spain. If the plaintiffs' appeal is allowed, the result will be that the Nationalist Government and the shipowners will be deprived of rights which they had at the commencement of the action when the ship was arrested—namely, ownership and possession which the owners were exercising on behalf of the Nationalist Government. After the trick practised on Captain Aguirre on October 15, if the hand of the Court is taken off the ship, she will be completely in the hands of the Republican Government and the defendants will be unable to regain possession except by force.

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(1) Ante, p. 37; affd. in H. L. [1939] A. C. 256.

[SCOTT L.J. Your clients did not take any steps to get the arrest set aside.]

The case stood over by arrangement pending the decision of the Admiralty Court in *The Arantzazu Mendi* (1) which then went to the Court of Appeal and the House of Lords.

In that case it was held that the Nationalist Government had given sufficient evidence of interest to entitle them to say that the writ and arrest impleaded them; so here, the affidavits show that the Nationalist Government had taken the appropriate steps to requisition the ship and that the master and owners held the ship for the Nationalist Government. The alleged requisition by the Republican Government was a nullity, for the position at all material times was that they were claiming jurisdiction to make orders on vessels registered at Bilbao, an area recognized as within that governed by the Nationalist Government: see *Banco de Bilbao* v. *Sancha.* (2)

The Nationalist Government, however, do not want any question of title decided; they merely want to ensure that their rights are not jeopardised. If the plaintiffs will reinstate Captain Aguirre on board the ship, the marshal's deputy can leave at once. It was contempt of Court to interfere with the res: c.f. *The Harmonie* (3) and the Court should not allow the chief custodian of the res, namely, the master loyal to the shipowners, to be changed while the res is under the arrest of the Court in such a way that the possession passes into the hands of the opposite parties in the case. When a vessel is under arrest, the Court "undertakes" that all parties will be protected: see the observations of Phillimore J. in *The Terqeste.* (4)

Gordon Willmer for the shipowners, respondents to the plaintiffs' appeal and appellants on the cross-appeal. The

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(1) Ante, p. 37, and [1939] A. C. 256.
(2) [1938] 2 K. B. 176, 195, 196.
(3) (1841) 1 W. Rob. 178.
(4) [1903] P. 26, 32.

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shipowners will consent to the release and pay the marshal's expenses from October 4, if the plaintiffs will allow Captain Aguirre to return on board. The defendants have never wanted the Court to decide that Aguirre is the lawful master; they merely want the status quo at the time of the discontinuance of the action restored—namely, the release of the ship with their master on board.

Unless the first affidavit filed on behalf of the plaintiffs, stating that Captain Aguirre was about to sail the ship away and refused to deliver her up to the plaintiffs, is true, the plaintiffs were not entitled to bring a possession action, for according to their later affidavit they were already in possession. The plaintiffs must prove that they, and not the owners and Captain Aguirre, were entitled to possession; the plaintiffs were not entitled to gain possession by ejecting Captain Aguirre or refusing to allow him to return on board, and they, through their servants, were guilty of a contempt of Court.

[SCOTT L.J. I think that the gangway incident was an interference with the Court, but you have not taken proceedings to bring the contempt to the notice of the Court.]

The summons for the reinstatement of the master was taken out at the suggestion of the marshal. The presumption is that the Court's order will be obeyed and the order that the defendants seek is that the release be subject to Captain Aguirre being allowed to return on board. [He was stopped.]

G. St. C. Pilcher K.C. in reply. The defendants can only succeed by invoking matters that happened after the discontinuance of the plaintiffs' action. When the alleged contempt of Court was committed, the ship ought not to have been under arrest; she ought to have been released on October 4. Further, no contempt of Court was committed. Captain Aguirre had been dismissed from his command on April 4 and was therefore a trespasser. There is no authority to be found in the books where the Court has intervened to put back a master. The marshal's function is solely to preserve the res and the security was not impaired in any way.

SCOTT L.J. This is an appeal from the President of the Admiralty Division upon a summons issued by the plaintiffs and a cross summons by the defendants in an action started in April of last year claiming possession of the steamship *Abodi Mendi*. The plaintiffs were the Republican Government of Spain, and the defendants were the ship itself and one Bonifacio Aguirre, the late master of the ship. The *Abodi Mendi* is one of several Spanish vessels which have been the subject of dispute and litigation in this country, broadly between the two Governments in Spain which have been at war. This ship has been in England since the spring of last year. On board her at the time when this action was begun was a part crew consisting of ten persons. Among them were two persons who, at a later stage, occupied the respective positions of master, representing the owners, that is the defendant Aguirre, and also representing through the owners the Nationalist Government of Spain, and another person, who at one time was chief officer and later on, in the course of last year, was appointed master of the ship by action taken on behalf of the Republican Government of Spain.

When the action of possession, initiated by a writ for possession in the ordinary way in the Admiralty Division, was started on April 13, 1938, the usual affidavit to found application for a warrant of arrest was sworn by a partner in the firm of solicitors acting for the plaintiffs. In consequence of that affidavit stating that the plaintiffs were afraid that the vessel might sail from the port of Barry for some destination unknown, and that the defendant Aguirre refused to deliver up the vessel to them, the Admiralty Marshal was put in charge of the vessel in the usual way, a custody which he exercised through his agent, one of the officials of the Board of Customs. The marshal remained on board, his fees being protected by the usual undertaking given by the plaintiffs' solicitors to see that he was paid.

On October 4, 1938, the plaintiffs gave notice to the Court and to the defendants that they wholly discontinued the action of possession. The position of the defendants was this: the defendant owners had entered unconditional appearance to

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the writ, but, in addition to the defendant owners, the Nationalist Government of Spain also entered an appearance, a conditional appearance without prejudice to an application to set aside the writ and the arrest of the ship. That was done no doubt in order to preserve the right of the Nationalist Government to object to the jurisdiction of the Court. The position of that Government is, as is common knowledge, that His Majesty's Government of the United Kingdom have recognized the de facto sovereignty of that Government over a large part of Spain, with the corollary in litigation in these Courts that that Government is entitled to the privileges of a sovereign State equally with the Republican Government which was, and continues as yet to be, recognized de jure by His Majesty's Government of the United Kingdom.

When the notice of discontinuance was given, the ordinary procedure in the Admiralty Court would normally be that it would result (inter alia) in the plaintiffs getting from the registry a release of the ship, a release from the marshal of his duty of staying on the ship, and a termination of their own obligation to continue to pay the marshal's charges after they had once discharged their liabilities to him up to date. Having regard, however, to the position that, not only was their master on board the ship with a certain number of the crew acting under his orders on their behalf, but there was also there Captain Aguirre, the master appointed by the owners of the ship, who acting through and for the owners, also represented the Nationalist Government of Spain, the plaintiffs on October 14 took out this summons and had it served on the defendants: "Application on the part of the Government of the Republic "of Spain that the warrant of arrest of the above vessel may "be removed and that the Admiralty Marshal's fees from "October 4, 1938, from the date of the notice of discon-"tinuance to the date of release, be paid by the defendants." On the same day they filed an affidavit sworn by the same member of the solicitors acting for them, Messrs. Petch & Company, stating that the writ had been issued on behalf of the Government of Spain, that appearances had been entered by the Nationalist Government and by the owners and by the late master, Aguirre, but further adding this: "As my clients "have obtained possession of the vessel they instruct me to "discontinue the present proceedings." The affidavit then referred to the notice of discontinuance and continued: "At the same time I called upon the solicitors for the various "parties who had appeared to this action to consent to the "immediate release of the ship in compliance with the release "of the Admiralty Registry. As those consents have not "been given" he asks for the help of the Court.

That summons was pending when, on the next day, October 15, the respective solicitors acting for the defendants sent to the plaintiffs' solicitors consents to the immediate release of the ship.

On October 18, the summons came on before the learned President, and on the hearing it became known, if not definitely known before, that on the afternoon of October 15 an incident had happened which made a definite difference in the position. Captain Aguirre, the master in the employ of the owners, and representing the Nationalist Government through the owners, had gone ashore with a steward, who presumably took the same political views as Captain Aguirre. On returning to the ship he found that the gangway had been raised against him and that he was refused admittance, and from that day to this he has been excluded from the ship.

It is unnecessary, I think, to deal further with the summons as before the learned President on October 18. It was adjourned by him, and on October 20 the owners of the ship took out a summons themselves for an order for the reinstatement of Captain Aguirre on board the ship, and filed an affidavit stating the facts which I have indicated shortly. That position continued until November 7 when the hearing of the summons was resumed by the learned President. On that summons he refused to give the plaintiffs what they wanted, namely, the immediate right to a release from their obligation to continue paying fees to the marshal, in other words, technically, a release from the arrest. On the other hand, he dismissed the cross-summons of the owners.

I do not think it necessary to discuss the reasons for the action of the learned President, but it is necessary to state what I think was the position at that time. Prima facie, on giving notice of discontinuance, the plaintiffs would have been entitled to receive from the Admiralty registry the necessary document upon which alone the marshal would go out—namely, a document called an " extract from the release book," the book in which there is an entry made of the order of release addressed to the marshal. Upon getting the extract, the plaintiffs, who had caused the arrest of the ship, would be entitled to show that document to the marshal and then, when they had discharged all their obligations to the marshal for the payment of his fees, and paid those fees pursuant to the undertaking of their solicitors, the marshal would go out. In the present case the learned President refused to do that, because he said that in these circumstances he was not going to consider the disputes between the two Governments, the Republican Government and the Nationalist Government, and that he thought if he made the order as asked he would in effect be doing so.

The question which we think is of supreme importance here, namely, the conduct of the crew representing the plaintiffs on board the ship in excluding Captain Aguirre from the ship in its relation to the custody of the ship by the Court, was not considered by the learned President. In our view, once the ship, in an action for possession, was put into the charge of the marshal of the Admiralty Court, all persons concerned in the litigation were under a duty to abstain from any interference with the custody of the ship by the marshal. The action being an action for possession, and one of the persons on board the ship being the master appointed by the owners, a forcible exclusion of that master from the ship by persons representing the plaintiffs was an act by which the plaintiffs took the law into their own hands in a way which affected the custody of the ship which the Court was retaining on account of whom it might concern, impartially on behalf of all parties. That act, in my opinion, was a contempt of Court, and was a matter that it was the duty of the Court to take into account in considering the order that it would make. If the order had been made as asked, the Court would have been taking no account of that act. Instead of keeping the ship in medio, and all questions of the right to possession of the ship open till the action was decided, the result would have been to leave the ship in the exclusive possession of the plaintiffs and to deprive the owners of it; and, for that matter, it would have precluded the question raised, and would have determined it in favour of the plaintiffs as against the Nationalist Government, who were objecting to the jurisdiction of the Court.

In my view the Nationalist Government were not entitled to ask the Court for any substantive relief, but I express no opinion on the question as to whether that would have prevented their complaining of an act of contempt against the Court. I leave that entirely open. It is enough for us to say that the shipowners were quite clearly entitled to raise the question. The facts proved by them in an affidavit stating the facts which I have described, and an affidavit filed by the plaintiffs' solicitor on October 14, to which I have referred, saying that the plaintiffs had obtained possession of the vessel, and that it was because they had obtained possession of the vessel that they instructed him to discontinue the action, show that the act of physical force by the crew of the vessel was an act for which the plaintiffs themselves were responsible; and the owners were therefore entitled to complain to the Court that the Court's custody had been interfered with by the plaintiffs themselves.

That is the position which on appeal from the learned President we feel is the important one. Apart from that, the plaintiffs would have been entitled to the usual release on payment of the marshal's fees. Whether they would have been under obligation to continue to pay those fees in spite of the fact that the marshal was continuing in possession at the instance of the defendants would have been possibly a question, but that does not arise now. The position is that prima facie they are entitled to obtain the release of the ship, provided that, when the Admiralty Marshal withdraws, the position is restored to what it was before the plaintiffs took the high-handed action which they did on October 15. This means that Captain Aguirre must be allowed to return to the ship in order to represent the owners' interests on board, as he did before.

The Court, therefore, proposes to make this order: discharge the two orders made by the learned President; and order that on the production to the registrar of an affidavit that Captain Aguirre has been permitted to return on board, and is on board, the release be issued from the Registry. Liberty to the plaintiffs or the defendant shipowners thereupon to extract the release pursuant to the provisions of Order XXIX. Liberty also to both plaintiffs and defendant owners to apply to the President of the Admiralty Division, if necessary. That will enable either party to apply if there is any difficulty in regard to the question of Captain Aguirre returning to and remaining on board the ship. As regards costs, there will be no order as to the costs of the plaintiffs below or of this appeal by them, the plaintiffs will pay the owners' costs of the owners' summons and of the owners' appeal. No order as to the costs of the Nationalist Government.

CLAUSON L.J. I agree. I only want to add a few words on a small point of Admiralty procedure about which I think there were signs of a little misunderstanding. As I read the rules, if a plaintiff, having started such an action as this, desires to put an end to it and is prepared to discontinue before the defendants have entered appearances, he can, under Order XXIX., r. 2, get the ship released as a matter of course without communicating with the defendants at all. Where, however, the defendants have entered appearances, as I understand the matter, it is the practice of the registry not to let the release go, although the plaintiff has discontinued, until communication has been made to the other parties and their consents produced. It was suggested that that practice of the registry was wrong. I only wish to say that, as I understand the matter, that practice seems to me to be correct, because, notwithstanding that the plaintiff has discontinued, the Court ought not to withdraw its hand from the ship until at least an opportunity has been given to the other parties to make any observations they wish to make about it. In the normal case there is no difficulty about it. A plaintiff wants to get rid of his obligations under the solicitor's undertaking that the marshal shall be paid. The defendants are only too glad to get their ship free, no trouble arises and, accordingly, consents are given and the matter goes through. But if for any reason the consent is not produced, the registry is right in not allowing the release to go and in pointing out that a special application must be made by the plaintiff if he desires release. This case is a very good example of the desirability of that, because there were very peculiar circumstances which obviously had to be considered before the Admiralty registry could let the release go.

FINLAY L.J. I also agree, though I confess I have felt rather more difficulty than my brothers have in the matter. If it had been proposed to order that the marshal should be responsible for replacing Captain Aguirre on board, I should, as at present advised, not have been able to assent to that order. But that is not now proposed, and I am glad to be able to say that I agree with the way in which Scott L.J. has put the case and with the order proposed.

Solicitors for the appellants, the Republican Government of Spain: *Petch & Co.*

Solicitors for the respondent, the Nationalist Government of Spain: *Ince, Roscoe, Wilson & Glover.*

Solicitors for the Nationalist Government: *H. A. Crowe & Co.*

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In re HORROCKS (DECEASED).

TAYLOR *v.* KERSHAW.

[1937. H. 3844.]

Probate—Will—Probate in common form—Application for probate in solemn form with omission of a word—Insufficient evidence to support the omission—Jurisdiction of Court of Probate.

By her will dated May 14, 1925, a testatrix, after appointing executors and trustees and bequeathing certain legacies, devised and bequeathed her real and personal estate to her trustees upon trust for sale and conversion and after payment of her funeral and testamentary expenses debts and legacies to hold the net residue upon trust subject to payment of a life interest to E. T. "for such charitable institution or institutions or other charitable "or benevolent object or objects in Preston and district as my "acting trustee or trustees may in his or their absolute discretion "select." The testatrix died on March 29, 1929, and her will (with an immaterial codicil) was proved in common form on May 7, 1929.

The will had been drawn by a solicitor, and during 1937 he discovered that owing to the use of the word "or" in place of "and" between "charitable" and "benevolent" the residuary gift was void for uncertainty. It was alleged that the mistake was due to a typist's error, and the trustees brought proceedings to have the probate in common form revoked and probate granted in solemn form with the omission of the word "or":—

Held (reversing the decision of the President of the Probate, Divorce, and Admiralty Division), (1.) that on the facts there was no evidence cogent enough to justify the alteration in the language of the will; and (2.) that, as the effect of omitting the word "or" would be to depart from the intention of the testatrix by limiting the objects of the residuary gift to those that were benevolent as well as charitable, there was no jurisdiction to make the alteration asked for.

Dictum of Lord Blackburn in *Rhodes* v. *Rhodes* (1882) 7 App Cas. 192, 198 applied.

APPEAL from the President.

By her will dated May 14, 1925, the testatrix, Maria Margaretta Horrocks, after appointing the plaintiffs to be executors and trustees of her will and bequeathing certain legacies and annuities and making certain other provisions, devised and bequeathed all her real and personal estate to her trustees upon trust for sale and conversion and out of the proceeds of such sale and conversion to pay her funeral and testamentary expenses and debts and the legacies and annuities bequeathed by her will or any codicil thereto and the duty on any legacies or annuities bequeathed free of duty; and she directed her trustees to stand possessed of the residue of the said money upon trust to pay the income to Eunice Taylor during her life and after her death " In trust for such charitable institution "or institutions or other charitable or benevolent object or "objects in Preston and district as my acting trustee or trustees "may in his or their absolute discretion select and to be paid "to or for such institutions or objects if more than one in "such proportions as my said acting trustee or trustees may "think proper." This was followed by a proviso that in exercising their discretion the trustees were to have regard to her wishes that no part of her residuary estate should go to the support of ritualistic practices which were contrary to the doctrines of the Church of England.

The testatrix died on March 29, 1929, and her will and a codicil not material to be referred to were proved by the plaintiffs in common form on May 7, 1929.

The testatrix, who was an elderly lady, had made a number of wills at different times, and Mr. Houghton, a solicitor practising at Preston, had regularly acted for her for a number of years.

In 1937, while the plaintiffs still held the residuary estate upon the trusts of the will, it was discovered that what was alleged to be a typist's error was contained in the residuary gift in the will, the error being that " or " appeared instead of " and " in the expression " charitable or benevolent." The plaintiffs therefore commenced proceedings by notice of motion to have the probate of the will corrected by the omission of the word " or," but as the next of kin objected to an issue of such importance being decided on motion, an action was commenced on November 24, 1937, claiming to have the common form grant of probate revoked and probate of the will and codicil granted in solemn form with the omission of the word " or."

The evidence in regard to the preparation and execution

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of the will is fully stated in the judgment of Sir Wilfrid Greene M.R.

The President said that the word on which the whole controversy turned was the word " or " between the words " charitable " and " benevolent." It so happened that the particular words " charitable or benevolent " coupled with a discretion on the part of the trustees were selected by Lord Davey in *Hunter* v. *Attorney-General* (1) as a form of words which would result in the failure of a gift for uncertainty. If that was the effect of this will, the last thing wished by the testatrix would happen. The question was whether it was the duty of the Court to pronounce probate without the inclusion of the offending word, and in deciding this he did not propose to consider or be guided by any guess as to the effect of striking out " or " and leaving " charitable benevolent " in the will. It was admitted that it was impossible for the Court to substitute the word " and." If the conditions were satisfied upon which the Court had the duty to strike out " or " as not being in the will with the knowledge and approval of the testatrix it did not concern the Court what the result would be.

The concrete question in this case was whether the word " or " was present in the will as a result of mistaken draftsmanship on the part of the solicitor, in which case Mr. Middleton admitted that he could not succeed; or whether it was in the will by mistake. That was simply a question of fact, and he had come to the conclusion on a consideration of the evidence that the word had been inserted by a mistake of the clerk to whom the solicitor dictated the clause of the will in which it occurred. He would therefore order its deletion without regard to the consequences of this alteration of the will.

The defendants appealed. The appeal was heard on January 13, 16, 17 and 18, and judgment given on February 16, 1939.

Charles Harman K.C. and *H. W. Barnard* for the appellants.

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(1) [1899] A. C. 309, 323.

On the facts there is no ground for making the omission asked for. Apart from the documents themselves the matter turns entirely on the evidence of Mr. Houghton as given at the hearing. It was very contradictory and differs remarkably from that contained in an affidavit sworn by him in support of the original motion. It is obvious that in much that he says he is not speaking from recollection but from inferences drawn by him as to what probably was done in the circumstances. He suggests that he did not read the residuary clause over to the testatrix, but only stated its general effect; but it is remarkable that an alteration of the draft appears only a few words after the critical phrase "charitable or benevolent objects," the alteration being from "in England" to "in Preston and district." It is hard to believe that the whole clause was not read to her and approved as altered. Nor is there any real evidence of a typist's error. Mr. Houghton said he read out the clause from a volume of Key and Elphinstone's Precedents, and that he would never have altered a precedent; but in fact he had to do so, as the clause in the book related to charitable legacies to be selected by "the acting executor or executors." On the facts, therefore, the omission of "or" ought never to have been made.

But the matter did not stop there, for even if it be accepted that the alleged alteration from "and" to "or" was a typist's error and that neither Mr. Houghton nor the testatrix looked at it and that, if Mr. Houghton had looked at it and checked it with the precedent, he would have altered it, the Court of Probate has no jurisdiction to make the omission. The jurisdiction of the Court is limited to striking out words in a will which on the face of them contradict the testator's intention, and the result of striking out "or" in the residuary clause of this will is to admit to probate a will which is not that of the testatrix. The effect of striking out "or" is to leave a blank.

[SIR WILFRID GREENE M.R. The order is not to leave a blank but to omit the word.]

However that may be, it is one thing to strike out words because on the face of them they do not express what the

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testatrix intended, but it is different when it is not the words but the law which would not satisfy the testatrix. It is not sufficient to say that if she had known the law she would have used different words. *Harter* v. *Harter* (1) shows the limit of the Court's power, and shows the danger of doing what the President did in this case by omitting a word with the object of producing the intention of the testatrix, though not clothed in language she would have used. Earlier cases showing the extent of that jurisdiction are *In the goods of Duane* (2) and *Guardhouse* v. *Blackburn.* (3) The latter case is also material in that it states the rule that a will should be read over to the testator before he executes it. The rigidity of that rule has not been cut down, and this lends support to the contention on the first part of the case that the testatrix had had her attention fully called to the residuary clause. Doubts as to whether you can alter a will by omitting even a word put in inadvertently if the effect is to change the sense were expressed by Lord Blackburn in *Rhodes* v. *Rhodes.* (4) *Morrell* v. *Morrell* (5) is the highwater-mark of alterations. *In the goods of Boehm* (6) was relied on by the President. But that was a judgment by consent. *Gregson* v. *Taylor* (7) and *Beech* v. *Public Trustee* (8) assist the appellants' argument. If the testatrix had read the will with every care and attention, it is clear that she would have been satisfied with the words, though they did not carry out her intention, for she was ignorant of the rule of law involved. It cannot be said that, because in its actual form the gift cannot be valid, the testatrix cannot have known of its contents and approved them. To make an alteration depending not on the facts but on the legal effect of the document is a thing which the Court cannot do. There is no case in the books where a mistake like this has been corrected—a mistake depending on the law's view of the language used: see *Beech's* case. (8) Further, there is no case in which an alteration has been made changing the grammatical meaning of a sentence. The difference between

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(1) (1873) L. R. 3 P. & M. 11.
(2) (1862) 2 Sw. & Tr. 590.
(3) (1866) L. R. 1 P. & M. 109.
(4) (1882) 7 App. Cas. 192, 198.
(5) (1882) 7 P. D. 68.
(6) [1891] P. 247.
(7) [1917] P. 256.
(8) [1923] P. 46.

" A and B " and " A or B " is that one is conjunctive and the other disjunctive: see *Hunter* v. *Attorney-General.* (1) The law was rightly stated in *Harter* v. *Harter.* (2) Any cases which go beyond that are wrong. That defines the limits of the jurisdiction to alter a will. On the facts the testatrix was of sound mind when she executed her will. That raises a presumption that she approved of every part of it. Clear evidence is required that some part of it was not her will. That has not been proved. If the solicitor put in " charitable or benevolent " thinking, as many lawyers do, that two words are better than one and the testatrix adopted what he had done, she did so because she had been given bad advice, and that is not a ground for altering the will.

[He referred on the point of " charitable or benevolent " to *Houston* v. *Burns* (3) and *Attorney-General for New Zealand* v. *Brown.* (4)]

Noel Middleton K.C. and *Bush James* for the respondents. In *Greenough* v. *Martin* (5) Sir John Nicholl said: " In a Court "of Construction where the *factum* of the instrument has been "previously established in the Court of Probate, the inquiry "is pretty closely restricted to the contents of the instrument "itself, in order to ascertain the intentions of the testator. "But in the Court of Probate, the inquiry is not so limited: "for the intentions of the deceased as to what instrument shall "operate as, and compose, his or her will, are to be there collected "from all the circumstances of the case taken together." That is the function of the Court of Probate. See also *Guardhouse* v. *Blackburn.* (6) It is material to consider the instructions of the testatrix. Every event down to the last moment when the will was completed may be taken into account. On every application for probate there must be established (*a*) knowledge and approval, (*b*) due execution, and (*c*) the sound mind of the testator. If the will had been read to the testatrix, it could not be altered by the omission of any word though it contained a mistake. But, if the will was

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(1) [1899] A. C. 309, 323.
(2) L. R. 3 P. & M. 11.
(3) [1918] A. C. 337.
(4) [1917] A. C. 393.
(5) (1824) 2 Addams Rep. 239, 243.
(6) L. R. 1 P. & M. 109.

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not read over to her, the Court might omit words unless it were shown that she knew and approved of them. The question is simply: Where does the onus lie on the question of knowledge and approval?

When an error or mistake in a will is established, the Court will omit the erroneous words regardless of the consequences. The Court of Probate has no concern with the result of omitting a word. That is left to the Court of construction, and the Court of Probate only omits a word when satisfied that a mistake has been made. If so satisfied, it always omits the word subject to certain rules laid down in *Guardhouse* v. *Blackburn.* (1) Two cases bearing on the subject are *In the goods of Boehm* (2) and *Beech* v. *Public Trustee.* (3) They show that the Court of Probate will always rectify an error so far as it can, subject to the restrictions imposed by statute or by rules laid down by the Court itself. It follows that the Court will make any omission that brings the will more into accord with the intention of the testator: see also *Burls* v. *Burls.* (4) There is another line of cases where a will revoked by a later will is revived by a codicil: *In the goods of Stedham* (5) and *In the goods of Dyke.* (6) [They also referred to *In the goods of Oswald* (7) and *In the goods of Moore* (8); *Fulton* v. *Andrew* (9); and *Rhodes* v. *Rhodes.* (10)]

[SIR WILFRID GREENE M.R. Assuming that the will was not read over to the testatrix here, what weight should be given to that circumstance?]

In that case there is no evidence to show that the word "or" had the approval of the testatrix.

[SIR WILFRID GREENE M.R. The approval of the draftsman would be sufficient.]

That also is not established here.

An omission from the will was made in *Morrell* v. *Morrell* (11), and it applies very exactly here, as the events that exist here and existed then are the same—namely, (1.) the will was not read over, (2.) there was a slip in the will, (3.) by striking out that slip the Court could give effect to the testatrix's intention: see *Brisco* v. *Baillie Hamilton* (1) and *Vaughan* v. *Clerk*. (2) In the latter case the will was engrossed by a clerk's mistake with "real" in place of "said." The Court struck out the word "real." All through the history of the matter, as shown by the cases cited, the Court has attached great importance to whether the will was read over to the testator or not, and the Court, when once satisfied that an error had been made which had not received the testator's approval, always tried to correct it while adhering to the principles laid down in *Guardhouse* v. *Blackburn*. (3) Here, on the facts, it makes all the difference whether the word "or" was brought to the mind of Mr. Houghton or was a mere error of the typist which he never noticed either before or when stating the contents of the will to the testatrix. The evidence shows that the will was not read over to the testatrix, so that the word "or" was a word the draftsman never intended to use. The evidence is before the Court, and that, it is contended, is the effect of it.

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(1) L. R. 1 P. & M. 109.
(2) [1891] P. 247, 250.
(3) [1923] P. 46, 54.
(4) (1868) L. R. 1 P. & M. 472.
(5) (1881) 6 P. D. 205.
(6) (1881) 6 P. D. 207.
(7) (1874) L. R. 3 P. & M. 162.
(8) [1892] P. 378.
(9) (1875) L. R. 7 H. L. 448.
(10) 7 App. Cas. 192, 199.
(11) 7 P. D. 68.

[Luxmoore L.J. The Court has to be satisfied that there was a mistake.]

It is submitted that there was sufficient to justify the President's finding of mistake.

[Sir Wilfrid Greene M.R. The testatrix's intention was to give her residuary estate for charitable objects. Where this was departed from was in adding the further one of benevolent objects. To strike out the word "or" does not give effect to the testatrix's intention, for it limits the objects to those that are both charitable and benevolent.]

That may be so, but if a word has been inserted in the will which was not intended the Court will strike it out, whatever the result. It follows that if neither the testatrix nor Mr. Houghton intended the word "or" to be there it must be struck out: see *Guardhouse* v. *Blackburn* (3); *Atter* v. *Atkinson*. (4)

(1) [1902] P. 234.
(2) (1902) 87 L. T. 144.
(3) L. R. 1 P. & M. 109.
(4) (1869) L. R. 1 P. & M. 665, 669.

[SIR WILFRID GREENE M.R. referred to *Caldwell* v. *Caldwell* (1) as showing that all charities are not benevolent.]

The facts of the present case bring it within *In the goods of Moore* (2); *In the goods of Schott* (3); and *In the goods of Boehm.* (4) It is the intention of a testator and not the words of his will that are vital, and the President was right in giving effect to that intention by striking out the word "or."

Charles Harman K.C. replied.

Cur. adv. vult.

1939. Feb. 16. SIR WILFRID GREENE M.R. read the judgment of the Court (SIR WILFRID GREENE M.R., FINLAY and LUXMOORE L.JJ.).

This is an appeal by the defendants in a probate action from a decree of the President of the Probate, Divorce and Admiralty Division, admitting the will and codicil of the testatrix, Miss Maria Margaretta Horrocks, to probate in solemn form, omitting from the will as signed and attested one word, and revoking a previous grant of probate in common form which had issued without the omission of that word. The respondents to the appeal, who were plaintiffs in the action, are the two persons appointed as executors by the will of the testatrix; one of them, Mr. Houghton, being the solicitor who prepared the will. The defendants are the next of kin of the testatrix. As the question in issue affects the validity of a gift in favour of charity, the Attorney-General was cited; but he did not appear either at the trial or before us, since he was content to leave the matter in the hands of the plaintiffs.

The testatrix was an elderly lady, delicate in health, but of pronounced opinions, particularly with regard to ritualistic practices in the Church of England, of which she strongly disapproved. She had made a number of wills at different times; and Mr. Houghton, a solicitor practising in Preston, where she lived, had regularly acted for her for a number of years, and was regarded by her as an old friend. She was well off: her residuary estate, the disposition of which is the subject-matter of the present controversy, has turned out to be worth about 18,000*l*., although at the time when the will was made its estimated value was about 6000*l*.

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(1) (1921) 91 L. J. (P. C.) 95.

(2) [1892] P. 378.

(3) [1901] P. 190.

(4) [1891] P. 247.

The will now in question was signed by the testatrix on May 14, 1925. By it she revoked all former wills and appointed the present respondents executors and trustees; and the expression " my trustees," when occurring in the will, was defined as meaning and including the named executors and the survivor of them, and the executors or administrators of such survivor or other the trustees or trustee for the time being of the will. She then proceeded to bequeath a large number of pecuniary legacies, many of them charitable; and, after making certain other provisions not material to be here stated, she devised and bequeathed the residue of her real and personal estate to her trustees, upon usual trusts for sale, and upon trust to pay the income of the net residue to the respondent, Miss Eunice Taylor, during her life, and after her death " In trust for such charitable institution or institutions "or other charitable or benevolent object or objects in Preston "and district as my acting trustee or trustees may in his or "their absolute discretion select and to be paid to or for such "institutions or objects, if more than one, in such proportions "as my said acting trustee or trustees may think proper "Provided that in exercising such discretion my trustee or "trustees shall have regard to my wishes that I do not desire "any portion of my residuary estate to go to the support of "ritualistic practices which are contrary to the doctrines of "the Church of England." The other provisions of the will have no bearing on the present question.

On December 31, 1927, the testatrix made a codicil to her will. Its provisions are for present purposes immaterial.

The testatrix died on March 29, 1929; and the will and codicil were proved in common form in the Lancaster District Registry by the respondents on May 7, 1929.

We were informed by counsel for the appellants, and it was not disputed, that the debts and testamentary expenses of the testatrix and the legacies bequeathed by her have long since been paid; and that, at the date of the matters next to be mentioned, the respondents held the residuary estate as trustees upon the trusts declared by the will.

At some time during the first half of the year 1937—that is to say, some twelve years after the date of the will—Mr. Houghton, it is alleged, discovered what is described as a "typist's error" in the will. This error is said to have consisted of the use of the word "or" instead of the word "and" in the phrase "charitable or benevolent" which appears in the passage already textually quoted from clause 7 of the will. The respondents thereupon instituted proceedings by notice of motion, with the object of having the probate corrected by the omission of the word "or." They supported their application by an affidavit by Mr. Houghton. The appellants objected to having an issue of such importance decided on motion; and, accordingly, the writ in this action was issued on November 24, 1937, claiming to have the common form grant revoked and probate in solemn form of the will and codicil with the omission of the word "or."

The learned President, during the discussion which took place after his judgment had been delivered, expressed a doubt as to the propriety of the appellants' action in objecting to have the matter decided on motion. With all respect to him, we are unable to share this doubt. The allegations made twelve years after the event called for strict and convincing proof. Mr. Houghton's affidavit was, as will appear later, a most unsatisfactory document; and the story which he told in it was in vital particulars quite different to that which he told in the witness-box. We think it most undesirable that a serious question such as the present should, at any rate in the absence of consent by all parties interested—all of them being sui juris—be decided otherwise than by action.

The only witnesses called at the trial by the petitioners were Mr. Houghton himself and Mr. John Lucas, one of his clerks, and an attesting witness to the will and codicil. The only relevant matter that is to be found in the evidence of Mr. Lucas is his statement that the will was not read over to the testatrix before she signed it. No evidence was called on behalf of the appellants.

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The alteration made in the will by the decree of the learned President has far-reaching consequences. The phrase "charitable or benevolent" as applied by testators to gifts in favour of institutions or purposes is all too familiar. It is a trap into which the unskilled draftsman not infrequently falls, with the result that the gift fails for uncertainty: *Hunter* v. *Attorney-General.* (1) The whole object of the action out of which this appeal arises is to avoid that result; and, if the respondents are right, that result will be avoided, since a gift for purposes or institutions under the description "charitable and benevolent" (and the phrase "charitable benevolent" can only have the same meaning) is a perfectly good gift, being confined to such charitable purposes as are benevolent: see *In re Best* (2), approved by the House of Lords in *Caldwell* v. *Caldwell.* (3) But the fact that a testator or the draftsman employed by him is mistaken as to the legal effect of the language which he uses is, of course, no ground for altering the will for the purpose of procuring the legal result desired: and the contrary was not suggested. The state of Mr. Houghton's knowledge at the time when the will was drawn up was apparently such as to make him an easy victim for this particular trap, since, when pressed in cross-examination as to whether he knew at that time what a great difference there was between "and" and "or" in this connection, he was unable to answer. The shock to his feelings which he suffered twelve years later on discovering that the word was "or" and not "and" must apparently have been caused by some after-acquired knowledge. But the respondents' case is not that Mr. Houghton fell into a trap which he did not know to be a trap—such a case would admittedly have been hopeless—but that he himself dictated words to a typist, namely, "charitable and benevolent," which avoided the trap and that the typist to whom he dictated blundered into it by substituting "or" for "and," either in the shorthand note itself or in its transcription.

Apart from any question of law as to the power of the

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(1) [1899] A. C. 309, 323.
(2) [1904] 2 Ch. 354.
(3) 91 L. J. (P. C.) 95.

Court of Probate to make the alteration desired, a case of this description, as we have already said, requires convincing evidence to support it; particularly in view of the far-reaching modification of the will as regards both construction and legal validity which the alteration effects. In our judgment, the evidence given in this case is not of a character which the Court ought to accept as adequate. On this ground alone, we are prepared to allow the appeal. But there is also another ground upon which, in our judgment, the appeal ought to be allowed—namely, that this alteration is one which the Court has no jurisdiction to make. It will be convenient to deal with this question of law after we have examined the evidence. We will do so in some detail out of respect for the learned President, who took a different view: and in our examination we have not failed to give full weight to the fact that the President saw and heard the witness, an advantage which we have not had.

So far as the actual evidence of recollection, as distinct from inference and speculation, was given by Mr. Houghton at the trial, the following facts appear to emerge with reasonable certainty. Shortly before May 8, 1925, Mr. Houghton went to see the testatrix at her request. This was the first interview. She handed him a list of legacies which she desired to bequeath in a new will which he was to prepare for her, and asked him to work out what her residuary estate would be worth. This Mr. Houghton did; and his estimate of 6000*l.* was noted by him at the foot of the list—it does not matter whether the actual note was made at or before the second interview, which took place on the morning of May 13. At this second interview the testatrix decided that the respondent, Eunice Taylor, should have a life interest in the residue; and a note to this effect was made by Mr. Houghton at the foot of the list. There was then a discussion as to the destination of the residue after the death of the life tenant. The testatrix informed Mr. Houghton of a particular charitable object which she wished to benefit. The name of this charitable object was written down by Mr. Houghton at the trial; and we have been informed what it was. It is, to say the least of it, doubtful whether it could be described as being " benevolent " as well as charitable. In mentioning this charitable object the testatrix expressed grave doubts and fears, which were apparently connected with the ritualistic tendencies in the Church, of which she disapproved. To get over the difficulty, Mr. Houghton suggested that the destination of the residuary estate (which was to be for charitable purposes, as appears from an answer in the transcript) should be left to the discretion of the executors. To this suggestion she agreed, provided a paragraph were inserted relating to ritualistic practices in the sense of the proviso which appears at the end of the extract already quoted.

On the afternoon of the same day, Mr. Houghton had a third interview with the testatrix. He brought with him a draft of the will and obtained her approval of its contents, subject to certain alterations and corrections. Mr. Houghton then went away taking the draft with him, had it engrossed, and sent two of his clerks with the engrossment to procure the signature of the testatrix and witness it.

So far there is nothing that calls for comment. But the rest of the evidence given by Mr. Houghton stands upon a different footing and requires careful scrutiny. A great deal turns upon his evidence as to two matters: first, the circumstances in which the draft of the will came into existence; and, secondly, the extent to which its actual wording was brought to the mind of the testatrix. We will deal with these in order.

Before considering the evidence of Mr. Houghton as to the way in which the draft was prepared, it is desirable to say a few words about its physical appearance. It is typed on quarto size paper. The dispositions of residue begin with cl. 6. Clause 7, which contains the crucial words, begins about the middle of p. 9; and the first words at the top of the next following page (10) are the words " charitable or benevolent." In the draft as typed, the word " England " appeared, but this was struck out and the words " Preston and district " inserted by Mr. Houghton at the third interview, on the instructions of the testatrix. There is no

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apparent break in the typing of the draft at any point and the spacing between paragraphs is throughout uniform. Various typing, drafting and grammatical errors have been corrected throughout. Familiar types of abbreviation (such as " trees " for " trustees ") are used throughout the draft. There is nothing in these respects to suggest that more than one hand was concerned in its production.

The sheets of which the draft is composed are held together by a piercer paper fastener at the top left-hand corner ; and it is important to notice that the fastener is so positioned in relation to the typescript that the whole of the top line on p. 10 is clearly visible as soon as the preceding p. 9 is turned over.

At the trial Mr. Houghton stated that after the first interview he went back to his office and dictated " the major "part of the will " to his " ordinary typist." His reason for saying this was : " I know it must have been completed "by the speed with which it was done afterwards. I know "I must have done the easier part of it, that is the legacies." After the second interview, Mr. Houghton said, he went back to the office. It was the dinner-hour. He sent for an Edition of Key and Elphinstone's Precedents, which he had in the office—the 10th Edition—and found in Volume 2, at p. 859, a precedent for a gift of legacies to charities at the discretion of executors. His answer in examination in chief was as follows : " I sent for the book. I cannot remember, "although I have thought very hard, who it was I called in "and dictated this clause to, but it was not any of the regular "typists ; I do not know whether it was a man or a woman, "but I dictated it from that book." No inquiries appear to have been made by Mr. Houghton as to the identity of this suggested second typist, or as to whether he or she was still in the employment of his firm. Later Mr. Houghton, referring to a typist's error in the third line on p. 10, said : " It must "have been somebody unskilled, I cannot possibly say who it "was now."

In his cross-examination, when asked what he really recollected was the first part of the draft, he replied that " I "should think that is an impossible question to answer." As to the typist he said: "You do not look at one's (*sic*) "typist. You simply ring a bell and some one comes in."

Now, as we have already pointed out, there is no apparent break in the typing of the draft. If the dictation to the suggested second typist began at cl. 6 or cl. 7, it must have continued to the end of the will. If the later paragraphs after cl. 7 had already been typed by the first typist, leaving a gap for the residuary gift, it is quite impossible to suppose that the space left for the residuary gift would have been (as it in fact is) the exact space required for that gift, no more and no less. Accordingly, at least five and a half pages of the draft must have been dictated to the suggested second typist.

In spite of the unsatisfactory nature of Mr. Houghton's evidence as to this unskilled second typist and the fact that his or her alleged lack of skill was obviously an inference drawn by Mr. Houghton and not a matter of recollection, it might have been possible to accept it but for the fact that it is quite inconsistent with the account given by Mr. Houghton in the affidavit which he swore in support of the motion. In that affidavit there is not a suggestion as to two typists having been concerned in the production of the draft. Only one dictation is referred to, not two; and the typist is said to have been a woman.

We do not think that the story of the alleged unskilled second typist ought to be accepted. But after all, this story is only of importance as tending to confirm Mr. Houghton's evidence as to what according to his recollection he did in fact dictate. That is the crucial matter. In his evidence in chief all that he said was that he dictated the clause from the book. In cross-examination he said: "I should never think of "altering the words of a precedent," and later he said: "I "sent for the precedent that expressed in the latest language "what I wished to convey and I used it. I should never have "thought of altering 'and' for 'or.'" Mr. Houghton's statement that he would never think of altering the words of a precedent was not accurate. In this particular precedent he

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made an alteration in order to adapt it to the purpose for which he was using it. In the precedent the discretion relates to legacies and is given to the " acting executor or executors " of the testator. This is altered in the draft to " acting trustee or trustees " which is incidentally quite inappropriate since the word " acting " when applied to executors is necessary and correct, but it was wholly wrong to use it in relation to the trustees of this will. Mr. Houghton, therefore, in this respect, did deliberately alter the wording of the precedent.

Reading Mr. Houghton's evidence as a whole, it appears to us that he was not speaking of his recollection with regard to these matters, but was drawing inferences as to what the facts must have been. That he was a witness prepared to draw unfounded inferences will appear from another matter in connection with the affidavit to which we shall presently refer. But one other piece of evidence must first be mentioned. When asked in cross-examination whether he went through the draft with the utmost care, line by line, he replied: "I do not agree with that suggestion "—a curious answer in view of the fact that he made a number of verbal corrections throughout the draft. When this was pointed out to him he said: " I naturally went through it carefully but I missed "this particular word," and a little later: " I should go "through the draft roughly before I went down and then I "went through it as I have told you with the testatrix." He was then asked whether he had any recollection of going through the draft before he went round to the house of the testatrix and he replied " No." Now in his affidavit he said: " The said draft was read over by me but unfortunately "I did not notice the typist's error probably because the "word 'or' appears on the first line of a page and since the "sheets were pinned together it was difficult to see the word "and my eye probably slipped over it." How Mr. Houghton can have come to say this passes our comprehension. It simply is not true that the way in which the sheets were pinned together made it difficult to see the word " or." There is only one hole in the pages of the draft, so that there can be no suggestion that the fastener was originally in a different position. It is quite obvious from the corrections made in the draft that Mr. Houghton went through it with the care which a conscientious solicitor would take when preparing a will, and he must have seen the crucial word " or."

We now come to the third interview at which Mr. Houghton explained the draft to the testatrix. If the crucial passage was read to the testatrix verbatim, the present action must admittedly fail. Mr. Houghton's evidence is again most unsatisfactory. He said : " It has never been my practice "to read over word for word a long will to a client. If people "are really interested in the wording of a will I generally give "them the draft to read for themselves and I should go through "it with her very sketchily indeed. I should tell her who the "executors were ; I should go through the legacies and she "would probably say are they in accordance with so and so "and when I came to the crucial part I should say you have "left the residue to so and so for life and for charitable purposes—I should find the clause—In England and she stopped "me . . . . I am perfectly sure I should not read out to an old "lady : ' In trust for such charitable institution or institutions "'or other charitable or benevolent objects.' " He admitted that he read the proviso verbatim to the testatrix.

Now the language which we have quoted is not the language of recollection. Mr. Houghton was clearly one of those witnesses so frequently met with who convince themselves of something and then draw inferences as to what must have happened. In saying this we cast no reflection upon Mr. Houghton's honesty.

One more matter must be mentioned. The residuary clause in the will of the testatrix had been used as a precedent in Mr. Houghton's office. During the year 1937 some question arose in the office as to a will prepared by Mr. Houghton for a client which contained a clause copied from that now in question. Mr. Houghton said that when this will was being prepared he told his clerk to take the clause in question from the Horrocks will. Mr. Houghton was asked whether he saw the clause after the clerk had drafted it. His answer was : "No. I simply ran through it with the testator, just as one "does." We do not think that Mr. Houghton was doing himself justice when he gave this answer. But, however that may be, a question arose after the death of that testator and Mr. Houghton said: "As soon as my attention was drawn "to the point I saw it at once." This answer fits in with his statement that he was not prepared to say what he knew in 1925 as to the vast difference in this particular connection between "and" and "or."

Upon the whole matter of fact, and giving to the evidence of Mr. Houghton the greatest weight of which it is capable, we are quite unable to find in it that cogency which is necessary before the Court can be justified in altering the language of so solemn an instrument as a will. It is admitted that the burden of proof is on the plaintiffs and that, if they fail to satisfy the Court that the use of the word "or" was not the deliberate choice of Mr. Houghton, the action must fail. The selection of that word was the most natural thing in the world for a man who was not familiar with the law on the subject, and Mr. Houghton's attempt to throw the blame on the typist entirely fails to convince us.

We will now deal with the question of law. The jurisdiction\ of the Court of Probate to grant probate of a will textually different to the actual document signed by the testator is a strictly limited one. If the testator himself approved the words to which he put his signature (and the presumption is that he approved them), those words must stand. If the words were selected by a draftsman to whom the testator confided the task of drafting his will, similarly the words so selected must stand, even if the testator was ignorant of the actual words used. The mistake of the testator or of the draftsman employed by him as to the legal effect of the words used is immaterial. The jurisdiction, where it exists, is admittedly confined to the exclusion of words and does not extend to the insertion of words, since the insertion of words would run counter to the provisions of the Wills Act. These matters are elementary and there is no dispute about them. The question in the present case is whether, assuming the word "or" was inserted by a typist's error as is alleged, the

Court has jurisdiction to strike it out. It cannot substitute the word " and." No claim is made for the excision of the word " benevolent " as well as of the word " or "—indeed no such claim could have been made since the word " benevolent " was deliberately chosen by Mr. Houghton. Bearing all these considerations in mind, we turn to an examination of the question formulated above.

The fact that the words of the will as signed may lead to an intestacy, while the omission of the word " or " will prevent this result, is in our opinion irrelevant. The Court is concerned with the words which the testatrix intended to use, not with the question whether those words will or will not produce an effective result in law. The position would be precisely the same if the words " charitable or benevolent " were sufficient to create a valid gift. Now the word " charitable " was deliberately chosen by Mr. Houghton and approved by the testatrix. As Mr. Houghton said: " My instructions were " 'charitable' and my intentions were 'charitable' " and (upon the assumption of fact on which we are considering the question) he told the testatrix that she had left the residue for charitable purposes. But the word " charitable " comprises the whole field of charity as understood by the law. Under the words " charitable or benevolent " considered solely from the point of view of construction and disregarding as irrelevant the fact that in law they are ineffective by reason of uncertainty, the trustees had the whole of that field open to their discretion. The effect of adding the words " or benevolent " did not alter the situation in this respect—they merely added another field—namely, so much of the field of benevolence as was not already included under the word "charitable." If the case had been that the words " or benevolent " ought to be struck out, the word " charitable " would have remained with its full signification, as was intended by the testatrix. But the effect of striking out the word " or " and leaving the word " benevolent " is, as we have already pointed out in the earlier part of this judgment, to qualify the word " charitable " and to cut out from its signification so much of the field of charity as is not benevolent.

In other words, the omission of the word "or" alters the effect of the word "charitable" which was approved by the testatrix and which she must be taken to have intended should have its full signification. It is as though a proviso were to be inserted to the effect that the discretion of the trustees was not to be exercised in favour of a charitable object unless it was also benevolent. The result would be that the one thing as to which the intentions and instructions of the testatrix were clear would be defeated.

Does the jurisdiction of the Court of Probate extend to the making of an alteration having this result? In our opinion it does not. It appears to us that so to alter a will as, under the guise of omission, to affect the sense of words deliberately chosen by the testator or his draftsman is equivalent to making a new will for the testator, and on principle we do not consider that this is permissible. No case was cited to us in which the Court of Probate had ever assumed jurisdiction to strike out words with such a result. The point has never, so far as we are aware, been the subject of express decision. Lord Blackburn in delivering the judgment of the Privy Council in *Rhodes* v. *Rhodes* (1) referred to it (2) in a passage which we will quote at length. He said: "When "an instrument purporting to be the will of the deceased person "has been executed by the deceased in the proper manner, "but it is sufficiently proved that though he executed the "instrument, yet that from fraud he executed that which was "not his will there is no difficulty in pronouncing that the "instrument is not his will. And it has been held that when "it is sufficiently proved that the instrument comprised his "will, but that from fraud, or perhaps from inadvertence, "such as that *In the Goods of Duane* (3), the instrument which "he actually executed contained also something which was "not his will, this latter part is to be rejected. And in such a "case, if this latter part is so distinct and severable from the "true part that the rejection of it does not alter the construction "of the true part, it has been held that, consistently with

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(1) 7 App. Cas. 192.
(2) Ibid. 198.
(3) (1862) 2 Sw. & Tr. 590.

"the Statute of Wills, the execution of what was shown to "be the true will, and something more, may be treated as the "execution of the true will alone. A much more difficult "question arises where the rejection of words alters the sense "of those which remain. For even though the Court is "convinced that the words were improperly introduced, so "that if the instrument was inter vivos they would reform "the instrument and order one in different words to be "executed, it cannot make the dead man execute a new "instrument; and there seems much difficulty in treating "the will after its sense is thus altered as valid within the "9th section of the 7 Will. 4 & 1 Vict. c. 26, the signature at "the end of the will required by that enactment having been "attached to what bore quite a different meaning. It has "never, as far as their Lordships are aware, been necessary "to decide as to this, though the judgment of Sir James "Hannen in *Harter* v. *Harter* (1) has some bearing on it. And "their Lordships think it unnecessary and therefore improper "now to express any opinion on this question, for the evidence "does not raise it."

The suggestion here made by the Privy Council as to the possible reason why the Court might be unable to reject words when to do so would alter the sense of what remained is one which commends itself to us.

A number of authorities were cited to us illustrative of the jurisdiction exercised by the Court of Probate in these matters. We do not think it necessary to refer to any of these authorities except two upon which the respondents particularly relied. It is sufficient to say of them that the cases in which the Court has decreed probate with the omission of words, phrases or clauses have all been cases where the matter omitted was, so to speak, self-contained and its omission did not alter the sense of what remained. The first of the two cases to which we have referred is *In the goods of Boehm* (2), a decision upon a motion in which all parties consented to the application. By a slip of the draftsman the name of one of the testator's two daughters Georgiana was inserted twice, so that the same

(1) L. R. 3 P. & M. 11. (2) [1891] P. 247.

daughter was given two legacies one of which was intended to be given to the other daughter Florence. Sir Francis Jeune granted probate of the will omitting the name Georgiana where it had been wrongly inserted and leaving blanks in its place. He realized the possibility that the effect of this might be to render the rest of the clause meaningless, as it would have been if a Court of construction had proved unable to get over the difficulty, a matter with which he was not concerned. But it is one thing to strike out a word which leaves what is left devoid of ascertainable content and therefore inoperative; it is quite another thing to strike out a word when by doing so the meaning of what is left is qualified and cut down. It is clear from Sir Francis Jeune's reference to *Rhodes* v. *Rhodes* (1) that he did not conceive himself to be doing something which altered the sense of what remained.

The other case is *In the goods of Schott* (2), also a decision of Sir Francis Jeune, who was then President. In that case the residuary disposition in the will directed the trustees "to "stand possessed of the net revenue of the said proceeds" upon certain trusts. Probate was asked for with the substitution of the word "residue" for "revenue." Sir Francis Jeune refused to make this substitution, but granted probate with the omission of the words "revenue of the said." Here again the effect of the omission was not to alter the sense of what remained. Neither of these authorities appears to us to assist the respondents.

The appeal will therefore be allowed and the decree of the learned President varied by striking out the words relating to the omission. In the Court below the costs of all parties were directed to be paid out of the estate. The notice of appeal does not ask for this direction to be altered and it will stand. With regard to the costs of the appeal we think that the fair course is to make a similar order.

Appeal allowed.

Solicitors: *Sheard, Breach & Co.; Gregory, Rowcliffe & Co., for Houghton, Reveley, Craven & Wilkins, Preston.*

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(1) 7 App. Cas. 192.

(2) [1901] P. 190.

H. C. G.

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Divorce—Desertion—Husband's petition—Presumption of continuing desertion—Husband's unwillingness to receive wife back no bar in absence of genuine offer to return—Wife's countercharge of adultery—Husband's admission in discretion statement admissible when put in evidence—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176, *as amended by Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2 (*b*)*—Matrimonial Causes Rules,* 1937, *r.* 28, *sub-r.* 5.

After agreeing temporarily to separate in 1929 a married couple never resumed cohabitation, because at the end of the stipulated period and later the wife refused to return. The husband continued to make her an allowance. In 1937 they discussed the question of a collusive divorce which came to nothing. In 1938 the husband petitioned for divorce on the ground of desertion, and prayed for the exercise of the discretion in respect of his adultery in 1934, of which he gave evidence at the hearing. The hearing was adjourned to await the decision of the Court in *Herod* v. *Herod* [1939] P. 11. The wife thereafter filed an answer denying desertion and alleging adultery:—

Held, the wife deserted the husband for at least three years immediately preceding the petition. When a spouse is deserted, he or she is in the position that the presumption is in his or her favour and against the deserting spouse. It is not until some offer to return is made by the deserting spouse that the question arises whether it is an offer which ought, in all the circumstances, to be accepted. Notwithstanding that the husband did not expect or really want his wife to come back, it was not incumbent on him to show that he was at all times during the three years next preceding the petition ready and willing to receive her.

The evidence given by the husband of his own adultery and the discretion statement which was put in evidence was available for the framing of the wife's countercharge of adultery, having regard to the terms of Matrimonial Causes Rule 28, sub-r. 5.

The wife was granted a decree nisi on her cross-prayer.

HUSBAND'S PETITION for divorce.

In 1929 a husband and wife agreed to a temporary separation which was to terminate in May, 1930. They parted on December 2, 1929, and have never lived together since. Attempts by the husband in 1930 and 1932 to effect a reconciliation were rejected by the wife. In 1938 the husband sought the dissolution of his marriage on the ground that his wife had deserted him for at least three years immediately

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preceding the presentation of the petition. He prayed for the exercise of the discretion notwithstanding his own adultery in 1934. The suit was undefended, and, after he had given evidence, including a confession of his own matrimonial offence, and put the discretion statement in evidence, the hearing was adjourned to await the decision in *Herod* v. *Herod* (1) on the question whether desertion could run after a deserted spouse had committed adultery.

Thereafter the wife obtained leave to file an answer, and did so, denying desertion, and alleging cruelty, and also adultery based on the husband's admissions in evidence. She prayed for a divorce in the exercise of the discretion. The husband by his reply denied cruelty.

J. F. Compton Miller for the husband.
H. D. Baskerville for the wife.

1938. Dec. 16. HENN COLLINS J. This is a case which presents difficulties rather of fact than of law, because most questions of law when they are ultimately resolved turn upon exact ascertainment of the facts. The petition is one brought by the husband founded solely upon desertion. The wife's answer alleges justification. She denies the desertion first of all and alternatively attempts to justify it by the husband's conduct. She relies upon that conduct as cruelty justifying the prayer of the answer for dissolution, alleging also adultery by the husband.

The case has taken a very curious course. I do not suppose it is very likely that a similar course will be taken in any other case, and probably the first question which has been discussed before me will, therefore, not arise. The case originally came on as an undefended case. The husband was asking for the exercise of the discretion of the Court, and he put in a discretion statement and deposed to adultery in the autumn of 1934. That case came on at a moment when the decision in a case of desertion on the question of adultery had not been reached, as it was shortly afterwards in the case of *Herod* v. *Herod*. (1)

(1) Ante, p. 11.

That case having been decided, this case might have been disposed of at once but for the fact that the wife had obtained leave to put in an answer and leave to include in that answer an allegation of adultery founded upon the petitioner's admission. When the case came on as an undefended suit it seemed to me at first that that could not be available, but having considered the authorities, including *B.* v. *B. and G.* (1), and also Matrimonial Causes Rule 28, sub-r. 5 (2), I am of the opinion that the evidence was available to the respondent. In view of that rule, I think that the evidence may be admitted when placed before the Court.

I now turn to the main question which has been discussed on the husband's petition. The parties were living unhappily together, and in the year 1929 there was a quarrel as a result of which they took counsel of the wife's father, and in the result they agreed in terms which were ultimately reduced into writing for a separation for six months on certain conditions. That agreement did not begin to operate immediately, because it took a month or so to close down the house, during which time they lived in the same house. In passing I may say (to touch upon another part of the case) that the wife satisfied me that no sexual relations took place after the quarrel to which I have referred. Having parted on the terms of this agreement, which specified the period at which it was to commence, December 2, 1929, expiring on May 2, 1930, provision was made that the wife was to receive an allowance of 5*l.* a fortnight on the understanding that she lived with her mother, that she was to have custody of the child for three months, and at the expiration of that time the husband was to have the option of the custody and, if, after three months, the husband took the custody of the child, the allowance was to be reduced by 30*s.* per fortnight. There was a further provision that both parties should have free access to the child at all times. Under that agreement they lived apart, and when the agreement for the six monthly period was coming to an end the husband invited the wife to return, but she did not. She had already expressed her intention to her mother of never returning and she never has, in fact, returned. The husband, however, continued to pay the allowance, because, as he said, and I believe him, that he did not want to see the mother of his child in want.

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(1) [1937] P. 1.

(2) The sub-rule reads: "Neither "the fact that a discretion "statement has been lodged nor "the fact of the said notice (of "additional allegations against the "accused spouse) has been given "nor the contents of the discretion "statement or notice shall be given "as evidence against the party "lodging or giving the same in "any matrimonial cause or matter "except when the party has put "in evidence in open Court the "discretion statement or the said "notice or the contents thereof."

In 1932, or it may have been at the end of 1931, he appears to have written a letter to his wife (which I have not got) which she acknowledged in a letter of January 10, 1932. In this she says: "You say in your letter (which I have mislaid at the "moment) to the effect that 'sooner or later we are bound to "'come together again so why not now.' I want you to realise "that not only would it be extremely distasteful to me, but "*impossible* for Dina, the latter being the most important "reason. . . . . Perhaps this all sounds very selfish to you, but I "have tried to explain it to you many times and you either "can't or won't understand that violation of nature's dictates "is prostitution and I must ask you to stop asking me to share "life with you for the future." So matters drifted on, the husband still paying the appropriate allowance and the wife not making any offer to return or changing her mind about returning at all.

In 1935–1936 matters took a fresh turn. Apparently the wife had been augmenting her allowance by her own earnings, but those apparently ceased in about April, 1937, and she pressed for a greater allowance. That brought the parties together in this sense (and this, I believe, not only from what I have been told by one or other of the parties in the box but from the letters which were written at the time) that both wanted to put an end to the existing state of things, of which both were tired, neither being free to marry again. I think that they believed that the best way out of that position was divorce, and the wife contemplated, with the approval of her husband, committing adultery with some one with whom she was in love and with whom she told her husband she was in love. But before that purpose of hers was fulfilled it became apparent to her that the measure which is now the Matrimonial Causes Act, 1937, might become law and enable a divorce to be obtained on the ground of desertion. She, therefore, was wise in time and did not commit the offence which she was contemplating. If this suit had been founded upon adultery committed by the wife in those circumstances there could be little doubt, I imagine, in the mind of anyone but that a suit so founded could not be successful. But, although, as I think, she clearly had that in contemplation, that does not show at all that a subsequent act would be a collusive act. The position really was at that time that the wife was saying to herself : "Well, I "have done with this unseemly affair, I will bide my time until "the Act which will enable me to proceed on the ground of "desertion." I, therefore, think that so far as this suit is concerned, collusion is out of the question.

The negotiations between the parties in 1936 have to be considered in relation to the fact of desertion. These parties were living apart, as I have said, under the agreement and continued apart, and the question I have to decide on that, apart from the allegations in the answer, is whether they were at all times after the expiration of the six months or so, more particularly, for any part of the three years immediately preceding the presentation of this petition, that is to say, January 3, 1935, and onwards, living apart by mutual consent.

It is upon that aspect of the question that I pause. I confess it is by no means an easy matter to decide, but I have come to the conclusion that the position of the husband was this : "My wife tells me she is in love with another man. She has so "far declined my invitation to come back and I think the "matter is now hopeless. I do not think she will come back." I doubt whether in those circumstances he expected or really wanted her to come back and I have had to consider what effect that has on the question of desertion. I think the true position is this (I am assuming for the purpose of this part of the case that the wife's departure from the home cannot be justified), that she in those circumstances had no justification "does." We do not think that Mr. Houghton was doing himself justice when he gave this answer. But, however that may be, a question arose after the death of that testator and Mr. Houghton said: "As soon as my attention was drawn "to the point I saw it at once." This answer fits in with his statement that he was not prepared to say what he knew in 1925 as to the vast difference in this particular connection between "and" and "or."

Upon the whole matter of fact, and giving to the evidence of Mr. Houghton the greatest weight of which it is capable, we are quite unable to find in it that cogency which is necessary before the Court can be justified in altering the language of so solemn an instrument as a will. It is admitted that the burden of proof is on the plaintiffs and that, if they fail to satisfy the Court that the use of the word "or" was not the deliberate choice of Mr. Houghton, the action must fail. The selection of that word was the most natural thing in the world for a man who was not familiar with the law on the subject, and Mr. Houghton's attempt to throw the blame on the typist entirely fails to convince us.

We will now deal with the question of law. The jurisdiction\ of the Court of Probate to grant probate of a will textually different to the actual document signed by the testator is a strictly limited one. If the testator himself approved the words to which he put his signature (and the presumption is that he approved them), those words must stand. If the words were selected by a draftsman to whom the testator confided the task of drafting his will, similarly the words so selected must stand, even if the testator was ignorant of the actual words used. The mistake of the testator or of the draftsman employed by him as to the legal effect of the words used is immaterial. The jurisdiction, where it exists, is admittedly confined to the exclusion of words and does not extend to the insertion of words, since the insertion of words would run counter to the provisions of the Wills Act. These matters are elementary and there is no dispute about them. The question in the present case is whether, assuming the word "or" was inserted by a typist's error as is alleged, the

"the Statute of Wills, the execution of what was shown to "be the true will, and something more, may be treated as the "execution of the true will alone. A much more difficult "question arises where the rejection of words alters the sense "of those which remain. For even though the Court is "convinced that the words were improperly introduced, so "that if the instrument was inter vivos they would reform "the instrument and order one in different words to be "executed, it cannot make the dead man execute a new "instrument; and there seems much difficulty in treating "the will after its sense is thus altered as valid within the "9th section of the 7 Will. 4 & 1 Vict. c. 26, the signature at "the end of the will required by that enactment having been "attached to what bore quite a different meaning. It has "never, as far as their Lordships are aware, been necessary "to decide as to this, though the judgment of Sir James "Hannen in *Harter* v. *Harter* (1) has some bearing on it. And "their Lordships think it unnecessary and therefore improper "now to express any opinion on this question, for the evidence "does not raise it."

The suggestion here made by the Privy Council as to the possible reason why the Court might be unable to reject words when to do so would alter the sense of what remained is one which commends itself to us.

A number of authorities were cited to us illustrative of the jurisdiction exercised by the Court of Probate in these matters. We do not think it necessary to refer to any of these authorities except two upon which the respondents particularly relied. It is sufficient to say of them that the cases in which the Court has decreed probate with the omission of words, phrases or clauses have all been cases where the matter omitted was, so to speak, self-contained and its omission did not alter the sense of what remained. The first of the two cases to which we have referred is *In the goods of Boehm* (2), a decision upon a motion in which all parties consented to the application. By a slip of the draftsman the name of one of the testator's two daughters Georgiana was inserted twice, so that the same

(1) L. R. 3 P. & M. 11.

(2) [1891] P. 247.

Distinguished. *Re* GUARDIANSHIP OF INFANTS ACTS AND *Re* S. B. [1949] 1 Ch. 108

1939

Feb. 28; *March* 1, 2, 3.

CLARK *v.* CLARK (No. 1).

Divorce—Husband's petition—Charge of adultery founded on birth of child to wife—Surviving child born 174 days after earliest date of intercourse—Period of gestation—Notional date of conception.

A husband's petition for divorce on the ground of alleged adultery was based solely on the fact of the birth of a child to the wife, whose paternity he disputed. It was established that the earliest material date on which marital intercourse could have taken place was 174 days before the birth of the child. It was submitted on behalf of the petitioner that for a viable child this would be an insufficient period of gestation, and that he could not be the father:—

Held, that, on the evidence of medical experts, the chances of survival in the case of a 174 days child were very remote, but a seven months or 196 days child might be viable. Having regard to the notional method adopted by the medical profession, a notional period of gestation of 196 days might actually be a period of 174 days. Therefore it was utterly impossible to say that there was anything extravagantly improbable about the child being a viable child, and it was quite plain that the child might be the equivalent of what would commonly be described or reckoned as a seven months baby, though the actual fœtal life could not exceed six months and six days.

CROSS-PETITIONS for divorce on the grounds of alleged adultery.

Mr. William Charles Henry Clark sought the dissolution of his marriage on the ground that his wife, Mrs. Louisa Mary Clark, had committed adultery. He based his charge on the fact that on February 10, 1936, the wife gave birth to a child, still surviving, of whom he alleged he could not have been the father. The wife denied the charge of adultery and alleged that the child was lawful issue of the marriage. In her cross-petition the wife charged her husband with adultery, which he denied.

The marriage took place on April 9, 1933, at Holy Trinity Church, Southall, Middlesex. After a prolonged absence of the husband abroad, during which the wife remained in England, he returned to England in August, 1935. Non-access during a material period before that date was established on aliunde evidence, and it was established that the earliest date of marital intercourse was August 20, 1935, which was one hundred and seventy-four days or six lunar months and six days before the birth to the wife of the child.

It was submitted on behalf of the husband (who was in Venezuela at the time of the hearing) that according to medical science this was too short a period of gestation for the child to have survived and therefore he could not be the father.

T. J. Kelly for the husband.
R. J. A. Temple for the wife.

1939. March 3. THE PRESIDENT (SIR BOYD MERRIMAN). This is, I think, quite the most remarkable case that I have had to deal with since I have sat here. It is a petition by a husband against his wife, based on the charge of adultery, and that charge is avowedly based simply and solely on the fact that on February 10, 1936, the wife gave birth to a child, and that if the husband was in fact the father, it is common ground that the earliest possible date on which conception could have taken place was August 20, 1935. The two dates are in fact one hundred and seventy-four days apart ; that is to say, six lunar months and six days, or twenty-four weeks and six days.

There is not a shred of evidence of any sort or kind given either by the husband or elicited in cross-examination of the wife, or any of her witnesses, that she was conducting a love affair, or indeed any sort of association with any man, known or unknown. On the contrary, she has called witnesses describing the sort of life that she was leading at the material time ; she has called sisters who were living in the house with her. Not one question was addressed either to the wife or to either of those young women to show that she was misconducting herself in any manner. The case stands or falls absolutely and entirely on what I am asked to find is a law of nature that the child having survived birth and being in fact alive at this moment some three years after her birth, cannot possibly be the child of the husband, because the maximum period of fœtal life was one hundred and seventy-four days.

Amongst other authorities, I have been referred to that very well known text-book, Taylor's Principles and Practice of

Medical Jurisprudence, 9th ed., 1934, vol. 2. After a review of this very subject, there appears, on p. 46, this passage: "It "would be in the highest degree unjust to impute illegitimacy to "off-spring, or a want of chastity to parents, merely from the "fact of a six months child being born living and surviving its "birth. There are, indeed, no justifiable medical grounds for "adopting such an opinion—a fact clearly brought out by a "question put to Campbell, the chief medical witness" (in a case details of which had been given). The author goes on: "In his examination-in-chief he admitted that he himself had "seen the case of a six months child who had survived for "several days. He then was required to say whether he could "assign any reason why, if after such a period of gestation it is "possible to prolong life for days, it should not be possible to "extend it to months. He could give no satisfactory reply."

Then the learned author goes on to amplify the great danger of injury to parties from any such rash presumption by citing yet another case. I could, of course, dispose of this case on that passage, and I find it difficult really to understand how in face of an authority like that it is possible to assert as a matter of law, or a matter of nature, that I am bound to find that this husband is not the father and therefore the wife must have been guilty of adultery. But I am not prepared to dispose of the case merely on the burden of proof. I have listened very carefully to all the evidence, medical and otherwise, given about this particular baby, and as I have come to a perfectly definite conclusion on the matter, I think it only fair to all parties, because the infant child is involved in this—that I should express the opinion which I have formed.

In the further and better particulars of this case, delivered eleven months, or very nearly eleven months after the birth of the child, which incidentally must have been living meanwhile quite close to the husband's family and could have been seen at any time by or on their behalf, it is alleged that the wife had given birth on February 10, 1936, to a fully developed nine months child. That allegation is simply grotesque on the evidence. So far from this child being a fully developed nine months child, the experienced mid-wife, who gave evidence, and to whose devotion coupled with that of the wife's mother and the wife herself the life of this child is due, said that this and one other child were the two most extreme cases of premature birth that she had ever seen in her experience lasting in all well over thirty years. The other case, she said, was one in Barnes before the war; she has never seen anything like this child on any other occasion, although naturally in the course of her profession she is constantly seeing children prematurely born.

[The President repeated the description of the baby given in evidence by the wife's mother when she saw the child after about one and a half hours; and said that the evidence of the wife, when she was allowed to see the child some few days later, was to the same effect. His Lordship proceeded :]

It is simply fantastic to describe this child as a fully developed nine months child, or for the husband and those who have advised him, in this case his family, to have put such an allegation forward, or to base any conclusions without investigation on any such assumption, because they could have ascertained perfectly well what the position really was about this child. But there still remains, when all that has been said, the question, on which Mr. Kelly has so forcibly relied: Whether it is possible, assuming everything, assuming that this child was an extreme "Premature," that it could have been conceived as late as August 20.

I must explain in a sentence or two how it comes about that it is so certain that that is the maximum period of fœtal life, or the earliest date of conception. It is common ground that on August 19, 1935, after a prolonged absence (and I am basing this finding upon evidence which does not conflict with the rule in *Russell* v. *Russell* (1)), the husband was in Venezuela, or on the way home, and it is common ground that it was on the night of August 20 that he and his wife first slept together and had sexual intercourse. That date is fixed beyond the slightest possibility of doubt; it is one of the important features of this case that that date is a fixed and not a speculative date,

(1) [1924] A. C. 687.

but before I leave it, there is an aspect of the matter with which I must deal.

The husband's case, as stated in the same particulars, is that, although he did stay with the wife on the night to which I have referred, he did not further cohabit with her throughout the said period. I am quite satisfied that that statement is as inaccurate as his allegation about the age of the child.

[The President dealt with the evidence of the wife and other witnesses, and continued:]

Dr. Roques, a gynæcologist of unquestioned standing, gave his evidence in a way which made it quite clear to me that he was expressing a perfectly honest opinion, and there is not the slightest reason whatever for not treating Dr. Roques's evidence as given in the very best possible faith. He gave in evidence-in-chief, and adhered to it in cross-examination, the statement that it was impossible that a child born one hundred and seventy-four days after intercourse could survive, though it might make feeble movements or even cry. He said that such a child would weigh at the outside 2 lbs. but almost certainly less and that it would be only twelve inches long or thereabouts.

[The President dealt with the method of weighing and measuring used by the nurse, and continued:]

This child was not quite so insignificant as the type of infant that Dr. Roques was describing, because it did in fact weigh at least 2½ lbs. at birth. I may say that I do not propose to go through all the technical details given by the various witnesses, though it must not be assumed that I have not read and re-read and got them clearly in my mind. Dr. Roques went on to say that in his view the earliest age at which a child was viable, or putting it the other way, the shortest period of fœtal life which speaking generally would produce a viable child which would survive, was twenty-eight weeks, or seven lunar months, and he added, as is unquestionably the fact, that before that age they are not considered notifiable by law but are regarded as miscarriages. At the same time, he did admit that the features described by the nurse were features of premature birth, and that the diet given by the nurse and under her direction, of sugar and water, and a little brandy at first, and eventually mother's milk, fed every hour to the child through a spoon or a pipette, was the proper method of treatment. I am satisfied that the nursing was of the most devoted character, and there is no doubt whatever that the child was extremely well cared for, and that is why she is alive at this time.

There is no dispute whatever that for a child of this age to survive, even giving a margin of two or three weeks in its favour, is a very remarkable thing. Dr. Morgan, however, a woman doctor of very considerable experience, particularly in regard to premature births during the last ten years, asserted without any qualification whatever that she would not accept that it was impossible ; she said that was much too dogmatic, and she said that on at least three occasions she had had abortions born at twenty-four weeks which had lived for twenty-four hours, but they were children in every case that weighed under 2 lbs. It is quite clear, as all the doctors agree, that the heavier the child in this very low region of weights, the better chance it has of surviving; and everybody also agreed that if you could get the child over the first week or so and start it feeding, the chance of survival increased. I do not think there was any controversy about those facts, but the result was that, on the evidence of experts, in the case of a one hundred and seventy-four days child the chances of survival were very remote.

Then we come to what I think is one of the important features in dealing with the medical evidence. I confess that it was not until rather late in the evidence that I appreciated how important this factor was, and it was for that reason, so that there should be no misapprehension about it, that I asked Dr. Roques to come back after the other doctors had given their evidence, in order to deal with the point, and he dealt with it perfectly frankly. All the doctors agree, and of course everybody knows, apart from medical evidence, that in the ordinary case it is almost impossible to ascertain with any sort of certainty on what date conception actually takes place. I am not saying that there may not be cases, particularly in cases of unmarried people, where the date can be obtained with practical certainty, but that is the exception rather than the rule. In the ordinary case of married people it is really a matter of rule of thumb, and, although not invariably so, most of the tables and the statistics are based upon what is really, when one analyses it, a notional period. The doctors agree, and indeed it is obvious, that what matters is not the date of the intercourse which in fact results in conception, but the date when the fœtal life begins, in other words, when the fertilization takes place. That is the fact which it is almost impossible in the ordinary case to ascertain, but, of course, it is the only fact that matters so far as nature is concerned.

Therefore, in the ordinary case, as Dr. Roques said, the medical profession have to reckon in the absence of any better information, from an artificial date—namely, the date of the last menstrual period. That date, as Dr. Roques said, is unlikely to be the real date of conception or fertilization, and, indeed, it is unlikely that any of the seven days of that period would be so either. The actual conception would probably take place at any time up to the date when the next period is due to begin. It follows from that, as Dr. Roques admitted, that in a case where you can only take this notional method of calculation, a child born on the one hundred and ninety-sixth day, that is at the twenty-eighth week, or seventh lunar month from the notional starting point, might very well quite normally be conceived in fact on the twenty-second day from the starting point—the notional starting point—that is to say, some six days before the next period is due to start; and that a case which would be regarded, on the usual methods of calculation, as a one hundred and ninety-six days case, or a seven months child, would in fact be a one hundred and seventy-four days case, or exactly this case. That does not involve that the actual conception in this case took place before August 20. It only involves this, that when you are dealing with a very exceptional case in which you have got an absolute date fixed as the earliest possible date, you can only compare that case with the cases in the text books by reducing them to the same terms; in other words, comparing like with like, and that is what I have just endeavoured to do in the calculations, which Dr. Roques admitted had been corectly made and to which he said there was no answer.

There is another way of testing it which produces almost exactly the same result. It is also common ground between the doctors that though anything in the nature of a proper period after conception has taken place is most unlikely, if not impossible, it is quite common for women after conception to have an imperfect and incomplete period. Assuming for the sake of argument that in this case conception did take place on August 20, it is the evidence of the wife that the next day she had some sort of bleeding ; she was not prepared to say that it was a period perfect or imperfect ; it was certainly not perfect, because at that time she said that her periods were all very irregular and imperfect ; she never had what she called a proper period. Assuming for the sake of argument that there was something in the nature of a period, and that that period, so called, more or less corresponded in point of time with the one in the previous month, it would then follow that the previous period that occurred twenty-six or twenty-seven days before the ascertained date of conception, namely August 20, would give, on the usual notional reckoning a notional fœtal life of some two hundred days as compared with the actual fœtal life of one hundred and seventy-four. Again, comparing like with like, it is not necessarily so, but it may very well be that the case of this child, whose fœtal life cannot have exceeded one hundred and seventy-four days, may nevertheless be comparable with any of the cases met with in private practice, in the hospitals, and in the text books, which are recorded as having a notional fœtal life of over one hundred and ninety, or even up to two hundred days.

Therefore, when one reduces the actual facts of this case to the same terms as those upon which the theories and the tables are based, it is utterly impossible to say that there is anything extravagantly improbable about this being a viable child.

I do not think there is any doubt whatever that this extremely premature birth was brought about by a very nasty fall within the preceding forty-eight hours. Having regard to the fact, which cannot be disputed, that we have got here the rare combination of an extremely premature child with a fixed and not a notional maximum length of the fœtal life, I am quite satisfied that there is no ground whatever for saying that this child is illegitimate. As I have already said, for the reasons I have given which I could amplify if necessary, it is quite plain that, according to medical reckonings though not in actual fact, this child is the equivalent, or may be the equivalent, of what would commonly be described or reckoned as a seven months baby, though the actual fœtal life cannot exceed six months and six days.

For these reasons, not merely am I not prepared to find that the husband has discharged the burden of proof, but, having listened very carefully to the wife and to her witnesses' description of the child, whose lower limbs are still in irons, and in particular having regard to the wife's demeanour as a witness, I am satisfied that she is telling me the truth. This child was conceived in wedlock, and having come to that conclusion, I think that it is only right that I should say so, and not treat the matter merely from the point of view of giving the wife the benefit of the doubt, although, as I have already said, it would be utterly impossible in my view to find the affirmative against her on the evidence which is before me.

On the wife's cross-charges the President found that the husband had been guilty of adultery and granted the wife a decree nisi of divorce. The husband's petition was dismissed.

Solicitors: *Barlow & Co.*; *George C. Carter & Co.*

W. L.

GALENE *v.* GALENE OTHERWISE GALICE.

1939
March 3.

Nullity—Jurisdiction—French nationals married in England—Marriage annulled by French Court for informality—Declaration of nullity.

Where a marriage in England between French nationals had been annulled for informality by the Court of the domicil in France, the Court exercised jurisdiction on the former husband's petition for nullity and granted him a declaration of nullity.

Decision in *De Massa* v. *De Massa* (The Times, March 31, 1931) followed.

UNDEFENDED PETITION for nullity of marriage.

The petitioner, M. Galene, a French national aged twenty-one years, went through a form of marriage at the Paddington register office on December 22, 1921, with Mlle. Marie Galice, also a French national, aged twenty-three years. The petitioner was domiciled in France, whither he returned in March, 1922. Proceedings for nullity of marriage were initiated by his father in that country, and on June 8, 1923, the Civil Tribunal of First Instance declared that the form of marriage between the petitioner and the respondent was null and void, being contrary to French law by reason (inter alia) of its being clandestine, and without the consent of the parents of either party, and moreover of the marriage not being recorded in the register of Civil Status in France. There was no appeal. The petitioner married again in 1929:

Julian Fuller for the petitioner. This is an unusual case, but it is on all fours with the decision of Lord Merrivale in *De Massa* v. *De Massa* (1), which is quoted with approval in Cheshire (Private International Law), 2nd ed., p. 352. The then President's judgment carries into effect the general principle laid down in *Salvesen otherwise Lorang* v. *Austrian Property Administrator* (2)—namely, that a judgment by the competent Court of domicil was a judgment in rem which must be recognized and enforced by this Court, unless it were obtained by fraud, collusion, or other unlawful means.

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(1) The Times, March 31, 1931. (2) [1927] A. C. 641.

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Ogden v. *Ogden* (1) is not in point, since, as stated in *Salvesen's* case (2), this was an almost insoluble problem—there being two different domicils—and the case could not be held of universal application (per Lord Dunedin and Lord Phillimore) and was of doubtful authority. On the question of delay, the petitioner took legal opinion in 1924 and was advised that his legal status in Great Britain was in doubt, and he was not in a financial position to test the question. Now, having had the opportunity and means of taking further advice on the question of his status in England, he prays the Court to grant him a decree of nullity on the principle of *De Massa* v. *De Massa*. (3)

HENN COLLINS J. You are entitled to your decree nisi.

Solicitors: *Barry O'Brien & Co.*

(1) [1908] P. 46.

(2) [1927] A. C. 641.

(3) The Times, March 31, 1931.

W. L.

JORDAN *v.* JORDAN.

1938
July 18.

1939
Feb. 10, 16, 17; *March* 13.

Divorce—Desertion—Husband's petition for dissolution of marriage—Previous petition for divorce dismissed in 1934*—No resumption of cohabitation—Desertion for three years immediately preceding petition—Practice—Argument by King's Proctor—Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*), *as amended by Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2; *s.* 181, *sub-s.* 1.

On a husband's petition for divorce on the ground of desertion within the meaning of the Matrimonial Causes Act, 1937, it was established that the wife deserted him in 1932, and in the following year he filed a petition for divorce on the ground of her alleged adultery. She denied the charges and prayed for divorce on the ground of his alleged adultery. The petition was dismissed and the cross-charges failed in October, 1934. The husband filed the present petition in January, 1938:—

Held, that the institution and prosecution of the previous proceedings by the deserted spouse did not absolutely terminate the offence of desertion, but merely precluded him from asserting that a period of desertion ran during the pendency of those proceedings; and, as a matter of law, the continued absence of the other spouse could reassume the quality of desertion after the suspensory bar had been removed by the termination of the suit, although there had been no resumption of cohabitation.

There was no presumption that the desertion survived the termination of the suit. On the other hand it was not, as a matter of law, a condition precedent to the revival or continuance of the original desertion, after the earlier proceedings were disposed of, that some steps had been taken by the petitioner towards bringing about a resumption of cohabitation. It must depend on the circumstances whether it was necessary that the petitioner should take any, and what, steps to that end.

A decree nisi was pronounced.

HUSBAND'S PETITION for divorce.

In January, 1914, at the Woolwich register office the petitioner, Mr. Robert Alexander Jordan, was married to Mrs. Violet Blanche Jordan née Coggin. The wife deserted her husband in October, 1932. In March, 1933, the husband petitioned for divorce on the ground of the wife's alleged adultery. In June, 1933, that petition was tried as an undefended case and a decree nisi pronounced. In January, 1934, a Divisional Court rescinded the decree and ordered a rehearing on the plea of the wife and the co-respondent, who had obtained leave to appear. The charges were denied, and in October, 1934, the case was reheard and the petition dismissed. The wife's cross-charge of adultery was also dismissed. The present petition was filed in January, 1938, under the Matrimonial Causes Act, 1937, alleging desertion by the wife for a period of at least three years immediately preceding the presentation of the petition. The suit was undefended. The point of law arose whether the wife's original desertion had revived after the dismissal of the cross-suits in 1934, notwithstanding that there had been no resumption of cohabitation since that date; and on July 18, 1938, the case was adjourned for argument by the King's Proctor, under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 181, sub-s. 1.

Sir Terence O'Connor K.C., S.-G., and *Lord Drogheda* for the King's Proctor. The original act of desertion determines the character of what happens afterwards. Assuming original desertion, the presumption of continuing desertion is in favour of the deserted spouse. The burden is on the deserting spouse to take steps to terminate desertion.

[SIR BOYD MERRIMAN. All the old cases were decided on the basis of desertion for two years and upwards. Now the desertion must be for at least three years immediately preceding the petition.]

Once you have the original act of desertion, all that is necessary for it to mature to render the matrimonial offence sufficient for a decree is the effluxion of time. It is not proper to put on the deserted spouse the burden of showing that he made an offer to return. That appears from *Bowron* v. *Bowron* (1) per Scrutton L.J., and Henn Collins J. in *Sifton* v. *Sifton* (2) asserted the same principle. It was also clear from the judgment in *Papadopoulos* v. *Papadopoulos* (3) that desertion continued after the mutual separation of the parties notwithstanding that there was no resumption of cohabitation. On the ratio decidendi in *Herod* v. *Herod* (4), if a matrimonial

(1) [1925] P. 187, 195.
(2) Ante, p. 221, 222.
(3) [1936] P. 108.
(4) Ante, p. 11.

offence is committed by the deserted spouse which does not affect the mind of the deserter and therefore does not bar the petitioner's remedy, it is difficult to see why on first principles a petition by a deserted spouse which does not affect the mind of the deserter should be barred either, because the filing of a previous petition has not made it impossible for the deserter to come back.

[THE PRESIDENT. So long as the proceedings stand the petitioner can stop the respondent from interfering.]

In the cases of *Kettlewell* v. *Kettlewell* (1); *Farmer* v. *Farmer* (2); and *Wood* v. *Wood* (3) the charges of desertion were accompanied and coloured by charges of adultery, and also in *Lapington* v. *Lapington.* (4) It is arguable that the decision in *Stevenson* v. *Stevenson* (5) meant that the presentation by the petitioner of a previous petition is strong but not conclusive evidence that desertion has ceased to run, and support for that contention is to be found in some of the judgments of the full Court of Appeal in *Harriman* v. *Harriman.* (6) The Court is entitled to look at the causa causans. It was held in *Drew* v. *Drew* (7) that desertion continued despite the detention of the deserting spouse in prison.

[SIR BOYD MERRIMAN. But that is different from a case in which by filing a petition a person is asking the other spouse to keep away.]

Stevenson v. *Stevenson* (5), however, appears to be a binding authority for the proposition that the prosecution of a petition for divorce or judicial separation stops desertion from running during the pendency of such suit, though it is worthy of note that in *Knapp* v. *Knapp* (8) Sir James Hannen took the view that the original desertion was not wiped out by an intervening abortive petition, and that when the requisite two years had elapsed after the dismissal of that petition the wife petitioner was entitled to a decree on the ground

(1) (1880) 41 L. T. 737.
(2) (1884) 9 P. D. 245.
(3) (1887) 13 P. D. 22.
(4) (1888) 14 P. D. 21.
(5) [1911] P. 191.
(6) [1909] P. 123.
(7) (1887) 13 P. D. 97.
(8) (1880) 6 P. D. 10.

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of desertion and adultery on a fresh petition. That decision was approved by Sir Gorell Barnes in *Kay* v. *Kay* (1), which in turn was approved in *Stevenson* v. *Stevenson*. (2) The last-named decision was distinguished in *Chapman* v. *Chapman* (3), a case under the Matrimonial Causes Act, 1937, but in the recent cases of *Marthews* v. *Marthews* (4); *Walton* v. *Walton* (5); and *Bush* v. *Bush* (6), following *Stevenson* v. *Stevenson* (2), the Court of Appeal has laid it down that by operation of law the pendency of a suit brought by a deserted spouse prevents desertion from running. The mere filing of a petition does not: *Gibbs-Smith* v. *Gibbs-Smith*. (7)

[SIR BOYD MERRIMAN. The question here is whether, after the dismissal of the previous petition, desertion again begins to run.]

The true view may be that, though the previous proceedings interrupted the running of the desertion, they only suspended its running, and the offence continued after those proceedings were disposed of. The respondent's desertion involved an original act of wrongful separation, and for the purpose of obtaining relief the persistence of the respondent's intention to desert for the subsequent period of at least three years laid down by the statute may be presumed. The passage in Lord Penzance's judgment in *Fitzgerald* v. *Fitzgerald* (8), which has often caused embarrassment, becomes even more incomprehensible as a statement of principle, when one sees the course which the case took. This passage has been invoked to support the proposition that there must be a resumption of cohabitation before desertion can run again. But the reports of subsequent proceedings in the same case (9) and the observations of the late Mr. Barnard K.C. in *Kay* v. *Kay* (10) show that after the dismissal of the previous petition the wife's solicitors wrote to the respondent asking him to return;

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(1) [1904] P. 382.
(2) [1911] P. 191.
(3) [1938] P. 93.
(4) Ante, p. 97.
(5) Ante, p. 104.
(6) Ante, p. 142.
(7) Ante, p. 170.
(8) (1869) L. R. 1 P. & M. 694, 698; 38 L. J. (P. M. & A.) 14.
(9) (1874) L. R. 3 P. & M. 136; 43 L. J. (P. & M.) 13.
(10) [1904] P. 382, 383, 385.

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he failed to do so, and on her subsequent petition after waiting two years Sir James Hannen granted her a decree of divorce, though there had been no renewal of cohabitation. It would be going too far to say that there must be an active move on the part of the deserted party to bring about the termination of desertion. In all the circumstances of this case the Court would be warranted in finding, if my submission is right, that the petitioner has established his plea of desertion for at least three years preceding his petition.

R. J. A. Temple for the petitioner, in adopting the Solicitor-General's argument, cited other cases and said that the original desertion in 1932 was revived in 1934, and the wife made no effort to assert her rights as a wife, either by a summons for wilful neglect to maintain or otherwise. His argument on the facts is reproduced in the judgment.

Cur. adv. vult.

1939. March 13. THE PRESIDENT (SIR BOYD MERRIMAN). This is a husband's petition for divorce on the ground that his wife has deserted him without cause for a period of at least three years immediately preceding the presentation of the petition, which was filed on January 17, 1938. The wife left the husband on October 16, 1932, and there has been no resumption of cohabitation since that date. Meanwhile the husband, on March 1, 1933, filed a petition for divorce on the ground of his wife's adultery. The suit was undefended, and on June 14, 1933, a decree nisi was pronounced by Langton J. On December 18, 1933, upon affidavits explaining their failure to appear and defend the suit, the wife and the co-respondent named in the petition obtained leave to appear in the suit, and it was ordered that the decree nisi should not be made absolute before January 22, 1934. On January 19, 1934, Langton J. and myself sitting as a Divisional Court, by virtue of r. 46 of the Matrimonial Causes Rules then in force, ordered that the decree nisi be rescinded and the cause reheard. On January 26, 1934, the wife filed an answer denying the alleged adultery and making a

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cross-charge of adultery on the part of the husband in respect of which she prayed for divorce. The co-respondent also filed an answer. On October 17, 18 and 19, 1934, the case was tried before me, on the merits, and on the latter date I dismissed the prayer of the respondent's answer, dismissed the co-respondent from the suit, and dismissed the husband's petition.

Since that date not only has there been no resumption of cohabitation, but there have been no overtures to that end on the part of either spouse. In these circumstances, as there was no decision directly in point in relation to the period of desertion prescribed by the Matrimonial Causes Act, 1937, I adjourned the case, after hearing the husband's evidence, for the assistance of the King's Proctor.

Before dealing with the arguments on the question of law, addressed to me by the Solicitor-General, and by Mr. Temple for the husband, I must amplify the outline of the facts already given. In his evidence on the present petition the husband said that in 1930 the wife and the co-respondent in the former suit became partners in a café, that he pleaded without success with her to give up the business, that in October, 1932, he challenged his wife about a letter from the co-respondent, which he had found in her bag, that the wife said there was nothing in it, but that two days later, namely on October 16, 1932, he came home and found that she had gone, without warning, never in fact to return. I ought, in passing, to mention that the present petition originally alleged desertion as from that date, but pursuant to an order dated April 13, 1938, this was amended to an allegation of desertion in October, 1934. Mr. Temple informed me that this was done at the instance of the Divorce Registry, because the previous suit was still pending until that month. I do not think that this amendment should have been insisted upon in the Registry, as it is not in fact the husband's case. Mr. Temple has not attempted to argue that anything occurred in October, 1934, which, of itself, could constitute desertion. He admits that the husband's case stands or falls on the allegation that he was deserted on October 16, 1932, and that the legal

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effect of the previous proceedings must be considered in relation to that allegation. Accordingly I granted his application at the hearing to re-amend the petition by restoring the original date, but without requiring re-service of the petition.

I am bound to say that I have felt considerable doubt whether I ought to accept the evidence of the husband, as to the circumstances in which his wife left him in October, 1932, without further investigation. In adjourning the case for the assistance of the King's Proctor it appears from the shorthand note that I emphasized the desirability of his being given a transcript of the earlier proceedings, because the facts brought out there might be very material on the question whether there was or was not desertion before their institution, and that in turn might also be material on the present issue. In fact, because of the great expense involved, only one or two very short extracts of the evidence, and my judgment, have been transcribed. Other counsel were engaged in the earlier trial and I cannot pretend to have detailed recollection of the case, except in so far as it is refreshed by the full note which I took of the evidence. Mr. Temple admitted that I was entitled, indeed he invited me, to refresh my recollection of the earlier evidence. Accordingly I read the relevant passages from my note, so that they might appear upon the present shorthand note.

As regards the wife's cross-charges, it is unnecessary to say more than that they were based upon the allegation that the husband according to his own statement to the wife, as she said, had suffered from a venereal disease in 1927. This the husband denied, and there has been no plea for the exercise of the discretion on the part of the husband in either suit. Although the matter is not referred to in my judgment, my recollection is that the wife's cross-petition was not pursued, on the ground that, if adultery was to be inferred from those facts, it must obviously have been condoned. As the disease was not communicated to the wife, there was no element of cruelty in this respect. But the wife gave evidence that she had had a very unhappy married life from the first year of

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their marriage in 1914, that the husband was very cruel to her, that he had often struck her, that she had left him no less than six times, and that she left him in October, 1932, because she could no longer put up with his temper, which she said had been "terrible" on the night before she left. She made it clear, however, that she then intended to leave her husband finally, and that she did so without warning. The husband denied having struck his wife, though he admitted that he had given her one black eye, that she had issued a police court summons on one occasion when the court missionary had intervened, and that on two occasions she had gone home to her father.

His case against the wife consisted in part of circumstantial evidence about an alleged miscarriage, which on investigation was completely disposed of, and of direct evidence of the husband and his brother of their having watched on two occasions when they swore that they had seen the wife and the co-respondent together in a bedroom in circumstances of the most compromising character from which, if believed, the Court would almost have been bound to infer that adultery had been committed. The importance of recalling these details is that, in my judgment, I said expressly that I was not satisfied with the evidence of the husband, and still less with the evidence of his brother, and that I did accept the evidence of the wife that nothing of the kind described had in fact occurred; and at the end of a very short judgment I emphasized that I was not merely giving the wife and the co-respondent the benefit of the doubt, but that I was positively satisfied that no adultery had been committed at all. It is for this reason that I have hesitated in this petition to accept the evidence of the husband, untested, that he was the deserted spouse in 1932.

The Solicitor-General told me that the King's Proctor had merely appeared under s. 181, sub-s. 1, of the Judicature Act, 1925, to assist the Court by argument, and that no directions had been obtained which would have entitled him to take part in examining the petitioner under sub-s. 2 of the same section. At the same time he informed me that, although the evidence to which I have referred had not been specifically considered, the King's Proctor's representative had interviewed the wife, and that he was instructed that the King's Proctor did not consider that there was any material to put before the Court tending to contradict the husband's evidence that the wife had deserted him in 1932, though at the same time he reserved the right of the King's Proctor to take such steps as he might be directed to take under sub-s. 2 of s. 181 if such material came to his notice later. It is quite clear that an argument by the King's Proctor under s. 181, sub-s. 1, does not preclude him from intervening subsequently under either of the other two sub-sections; but in the circumstances of this particular case, as the Solicitor-General admitted, it would be difficult for him to assert, after decree nisi, that anything arising from the evidence previously given could be regarded as a material fact which had not been brought before the Court at this trial. Though I should have felt happier about my decision if the case had been contested and the husband cross-examined, nevertheless on the evidence before me I hold that the wife deserted him in October, 1932.

On this basis there remains the question whether she continued to desert him without cause for the three years immediately preceding the presentation of the petition, notwithstanding the fact that in March, 1933, the husband presented a petition for divorce, in the prosecution of which he persisted until it was finally disposed of in October, 1934. The question may be formulated as being whether the original desertion is entirely put an end to by the presentation of such a petition, or, at any rate, by its effective prosecution (see *Gibbs-Smith* v. *Gibbs-Smith* (1)), so that it is a condition precedent to establishing a subsequent charge of desertion that cohabitation has been resumed and a new offence of desertion has been committed; or whether the true position is that during the prosecution of such proceedings the petitioner is precluded from asserting that a period of desertion continues to run, but that the original offence, though suspended, is not wiped out and can be revived after the

(1) Ante, p. 170.

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proceedings have been disposed of. The Solicitor-General also developed an argument that antecedent desertion was not affected, as a matter of law, by the prosecution of such proceedings, but that their effect depended upon the circumstances in which the proceedings were instituted, and upon the intention of the parties. He ultimately abandoned this argument, and admitted that the result of the decisions in *Kay* v. *Kay* (1) and *Stevenson* v. *Stevenson* (2) is that the petitioning spouse is, at the least, and as a matter of law, precluded from asserting that a period of desertion is running during the prosecution of his or her petition for divorce. As Mr. Temple accepted this position, I need only say that I adhere to the reasons I gave in *Bush* v. *Bush* (3) for rejecting a precisely similar argument in that case and following the decisions in *Marthews* v. *Marthews* (4) and *Walton* v. *Walton*. (5)

Before, however, I leave *Bush* v. *Bush* (3) I wish to add one word about the latter part of the judgment, from which it might appear that I was encouraging the idea that the statutory period of three years immediately preceding the presentation of a petition could be obtained by ignoring the period during which previous proceedings were pending, and by aggregating periods before and after that period. I had been pressed with a decision to this effect in *Johnson* v. *Johnson* (6) in which Hodson J. distinguished *Stevenson* v. *Stevenson* (2) upon a construction of s. 6 of the Matrimonial Causes Act, 1937, to which I was not prepared to assent. But since, on any view of the case with which I was dealing, it was impossible to get a complete period of three years without including, as I was invited to do, the period during which the earlier petition was on the file, I was merely reserving the question whether an aggregation of two such periods could be justified by any other argument. I am convinced, however, by the argument in this case, though again it is unnecessary to the decision, that the words " has deserted the petitioner without "cause for a period of at least three years immediately

(1) Ante, p. 382.
(2) [1911] P. 191.
(3) Ante, p. 142.
(4) Ante, p. 97.
(5) Ante, p. 104.
(6) [1938] W. N. 299 ; 54 Times L. R. 1120.

"preceding the presentation of the petition," cannot be satisfied by aggregating with a period of less than three years immediately preceding the petition an earlier, but detached, period of whatever duration; and I understand that Hodson J. in *Cohen* v. *Cohen* (1) has recently given a decision to this effect.

Assuming, then, that the husband is precluded, as a matter of law, from asserting that the wife's desertion continued to run while he was prosecuting his former petition, can he nevertheless allege that the offence of desertion was not absolutely wiped out when he filed his petition in March, 1933, but that the wife's abstention from cohabitation could, to quote words used by Warrington L.J. in *Thomas* v. *Thomas* (2), "continue to have the quality of desertion" when the period of suspension came to an end on the dismissal of the suit? The difficulty in the way of this contention lies in the well known passage of Lord Penzance's judgment in *Fitzgerald* v. *Fitzgerald* (3), where he says: "But if the "state of cohabitation has already ceased to exist, whether "by the adverse act of the husband or wife, or even by the "mutual consent of both, 'desertion,' in my judgment, "becomes from that moment impossible to either, at least "until their common life and home have been resumed. In "the meantime either party may have the right to call upon "the other to resume their conjugal relations and, if refused, "to enforce their resumption; but such refusal cannot "constitute the offence intended by the statute under the "name of 'desertion without cause.'" Taken literally, this passage appears to lay down that, even if cohabitation originally ceased, as in this case, by the wrongful act of the wife, the husband, by taking what proved to be abortive proceedings, effectually prevented his wife from resuming cohabitation, whereupon it became impossible for him to allege desertion without a previous resumption of cohabitation.

I do not propose to analyse this passage, and that which precedes it on p. 697, sentence by sentence. The argument has shown that there is more than one phrase, which, if read out of its context in strict application to the facts of the particular case, is at least disputable. It might, for example, be supposed that Lord Penzance was saying, in the penultimate line on p. 697, that a wife who left her husband "with good cause" was herself a deserter, unless the sentence is read in light of his finding that, although her suspicions of the husband's fidelity were genuine, they were in fact unfounded. Likewise the opening sentence of the passage which I have already quoted on p. 698 appears to need qualification if it suggests that desertion is impossible when cohabitation has already ceased to exist by the adverse act of the deserter. It has often been explained that this judgment was not intended to be, and cannot be taken as, an exhaustive exposition of the law relating to desertion: see for example *Mahoney* v. *McCarthy* (1); *Bradshaw* v. *Bradshaw* (2); *Pulford* v. *Pulford* (3); *Papadopoulos* v. *Papadopoulos*. (4) Moreover, the industry of Lord Drogheda has brought to light that the concluding words of the passage quoted must be qualified by the subsequent history of the spouses. It appears that after a further rehearing in which the Queen's Proctor had intervened at the request of the Court, Lord Penzance confirmed his first decision and the petition was dismissed. Thereupon, in July, 1870, the wife made a formal demand for the resumption of cohabitation through her solicitor. This was disregarded, and after the lapse of two years therefrom a third petition was presented in October, 1872, on the ground of the husband's adultery and desertion. The Queen's Proctor intervened, and the facts as to the previous suits were laid before the Court; but Sir James Hannen held that both offences were proved and granted the wife a decree of dissolution. The case is reported on the question whether the decree absolute could be accelerated (5); but the important fact that the allegation of desertion appears to have been based upon the husband's refusal of the wife's demand for the resumption of cohabitation, and the subsequent lapse of two years, only appears in the Law Journal reports (1), from which I have taken the above summary of the facts.

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(1) This decision was upheld by C. A. on May 2, 1939.

(2) [1924] P. 194, 201.

(3) (1869) L. R. 1 P. & M. 694, 698.

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(1) [1892] P. 21, 25.
(2) [1897] P. 24, 27.
(3) [1923] P. 18, 20.
(4) [1936] P. 108, 114.
(5) (1874) L. R. 3 P. & M. 136.

Desertion as a matrimonial offence is a creature of the Matrimonial Causes Act, 1857, but neither in that nor in any subsequent statute has it been defined. Judges have repeatedly declined to attempt an exhaustive definition. Indeed the difficulties created by the passage which I have quoted from *Fitzgerald* v. *Fitzgerald* (2) illustrate the warning against making the attempt which is given by Lord Merrivale in *Jackson* v. *Jackson.* (3) But it is clear from the Act of 1857 itself that the offence of desertion was from the first regarded as existing independently of the period of its duration, for by s. 21 " a wife deserted by her husband " may obtain protection of her property " at any time after such desertion " ; and, until the references to the Divorce Court in that section were repealed by the Judicature Act, 1925, she could resort not only to the justices but to the Divorce Court for the purpose. It is, of course, true that before the Court can grant a decree, whether of divorce or judicial separation, proof that desertion has lasted for the statutory period is, and always has been, necessary, except in the case of non-compliance with a decree for the restitution of conjugal rights, when proof of the lapse of two years was dispensed with under s. 5 of the Matrimonial Causes Act, 1884, and under the corresponding provisions in ss. 176 and 185 of the Judicature Act, 1925, now obsolete so far as divorce is concerned ; and under the Summary Jurisdiction Acts, in which again there is no definition of the offence, a wife can obtain relief in respect of desertion without proving that it has lasted for any period at all.

It seems to me to be equally clear that the offence exists under the Act of 1937 independently of its duration. Indeed, while imposing a new period as regards both divorce and judicial separation, the Act preserves, in relation to judicial separation, all the earlier provisions, including those dispensing with any period of desertion in the case of non-compliance

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(1) (1874) 43 L. J. (P. & M.) 13.

(2) L. R. 1 P. & M. 694, 668.

(3) [1924] P. 19, 23.

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with a decree for restitution of conjugal rights. In other words the description of desertion given by Sir Francis Jeune P. in *Frowd* v. *Frowd* (1) as "the cessation of cohabitation "brought about by the fault or act of one of the parties," which was intended to be applicable both in courts of summary jurisdiction and in the Divorce Court, and to be independent of the lapse of any period, is, if not exhaustive, as true in relation to the present Act as it was to the earlier Acts.

In my opinion, the true view of the matter is that the institution and prosecution of proceedings by the deserted spouse does not absolutely terminate the offence of desertion, but merely precludes him or her from asserting that a period of desertion runs during the pendency of those proceedings; and that, as a matter of law, the continued absence of the other spouse can reassume "the quality of desertion," after the suspensory bar has been removed by the termination of the suit, although there has been no subsequent resumption of cohabitation. It must be conceded that there are passages in the judgment of Gorell Barnes J. in *Kay* v. *Kay* (2) which appear to be inconsistent with this view, at any rate in relation to a case of simple desertion unaccompanied by conduct on the part of the deserter which would justify the deserted spouse in refusing to return to cohabitation. But it is important to bear in mind the circumstances to which the learned judge was addressing himself. The parties separated in July, 1900, and less than two years afterwards, in May, 1902, the wife filed a petition alleging cruelty and adultery. This was followed in December, 1903, by a supplemental petition alleging desertion for two years or upwards, a period which could not possibly be completed without including time which had elapsed after the filing of the original petition; and by later amendment a further charge of adultery was added. All the charges of adultery and cruelty were held to be without foundation, but the jury found desertion from a date about seven months after the separation, and about fourteen months before the filing of the original petition in circumstances from

(1) [1904] P. 177, 179.

(2) [1904] P. 382.

which the learned judge inferred that they had come to the conclusion that the separation itself was the fault of the wife rather than that of the husband. That really disposed of the finding of desertion from the later date; but he dealt, alternatively, with the point of law arising from the prosecution of the original petition.

It is to be noted that, as the proceedings were only then being determined, the sole point was whether the petition had terminated the alleged desertion. No question of any subsequent revival of the desertion arose. It is evident that the learned judge regarded with disfavour the treatment by Sir James Hannen of the later suit of *Fitzgerald* v. *Fitzgerald* (1) in which, as in *Kay* v. *Kay* (2), the original separation was actually caused by the withdrawal of the wife. And he declined, rightly as was held in *Stevenson* v. *Stevenson* (3), to follow other decisions, discussed in his judgment, in which Sir James Hannen had allowed time subsequent to the institution of a suit to be reckoned as part of the period of a charge of desertion introduced by later amendment. But (4) he distinguished, with approval, the decision of Sir James Hannen in *Knapp* v. *Knapp* (5), a case in which within two years of the husband's desertion and elopement with another woman the wife had filed a petition based on that adultery and also on cruelty; this she subsequently abandoned, and, having waited for the full period of two years thereafter, during which time the husband continued to live in adultery, she filed a petition based on adultery and desertion and obtained a decree. Gorell Barnes J. said (6) that the mere filing of the first petition at a time when " apart from the question of desertion " the wife is in no way bound to go back to the husband, because of his living in adultery, will not stop the desertion running, but that " a different position arises when the circumstances "are such that there is nothing intervening between the "parties but the matter of desertion, which can be put "an end to at once." Then (7), in the passage beginning

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(1) (1874) L. R. 3 P. & M. 136.
(2) [1904] P. 382.
(3) [1911] P. 191.
(4) [1904] P. 394, 396.
(5) (1880) 6 P. D. 10.
(6) [1904] P. 394.
(7) Ibid. 396.

"Now I think that is a different position " down to the words "entitled to treat it as desertion right through from beginning "to end," he contrasts *Knapp* v. *Knapp* (1) with *Kay* v. *Kay* (2), saying that though the husband's attitude of mind was presumed to be precisely the same throughout, the wife had put it out of his power practically to return by filing the petition and maintaining her charges from then up to the time judgment was given.

If the learned judge, in speaking of the desertion running right through from beginning to end, meant that the period could be reckoned as continuing throughout the time when the abandoned petition was on the file, that would be in conflict with the law declared in *Stevenson* v. *Stevenson.* (3) But if, as I think it must be, he meant that, although that time had to be excluded from the reckoning of the period, the husband was the deserter throughout, it seems to me to be immaterial whether a husband's intention to desert is manifested by conduct from which it is clear that he will never return, or by conduct which entitles his wife to refuse to return. His attitude and intentions are irrelevant so long as the wife is prosecuting her suit for divorce, and vice versa, and whether the institution of the suit prevents the old statutory period of two years from accruing, or its continuance to within three years of the presentation of a subsequent petition prevents the new one from beginning in time, there is an end of the matter. So also if, the suit being disposed of, the deserter seeks to make amends, and the other spouse has no ground for refusing to return to cohabitation: *Jones* v. *Newtown and Llanidloes Guardians.* (4) But if it is established that the deserter's attitude of mind is unchanged throughout, I see no reason why the existence of the other spouse's obligation to resume cohabitation, if the deserter should happen to change his mind and repent, is sufficient, of itself, to negative desertion, after a suit has been disposed of, any more than it would have before its inception.

Though it is not directly in point, the decision in *Boulton* v.

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(1) (1880) 6 P. D. 10.

(2) [1904] P. 382.

(3) [1911] P. 191.

(4) [1920] 3 K. B. 361, 384, 385.

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Boulton (1) supports the view I have formed. It was held in that case that a period of desertion could begin to run again when, upon notice to the husband, the justices cancelled an earlier non-cohabitation order, based on a finding of desertion, and informed him that he was then at liberty to return to his wife, although no resumption of cohabitation followed. The fuller report of the argument in the Law Times Reports (2) shows that the decision of Horridge J. was based upon consideration, amongst other authorities, both of *Fitzgerald* v. *Fitzgerald* (3) and *Kay* v. *Kay*. (4) But this does not mean that there is any presumption that the desertion survives the termination of the suit. The Solicitor-General referred me to the passage in *Bowron* v. *Bowron* (5), where Scrutton L.J. said: "The intention [to desert] is presumed to continue, "unless the husband proves genuine repentance and sincere "and reasonable attempts to get his wife back." That phrase, as the preceding sentence shows, was used in relation to a case of "constructive" desertion where there had been original cruelty on the part of the husband and an expressed intention to force the wife to leave. But, though the same presumption has been invoked where the deserting spouse merely remained absent from the matrimonial home without excuse (see *Sifton* v. *Sifton* (6)), I do not think that it can be relied on in a case where the petitioner is precluded by his own act from asserting that the desertion continues without interruption. Mr. Temple, as I think rightly, disclaimed any attempt to argue that on the final disposal of the earlier proceedings a fresh period of desertion accrued automatically.

On the other hand, I do not think that it can be laid down, as a matter of law, that it is a condition precedent to the revival or continuance of the original desertion, after the earlier proceedings are disposed of, that some steps have been taken by the petitioner towards bringing about a resumption of cohabitation. It is sufficient, in my opinion, to say that, the burden being always upon the petitioner to prove that

(1) [1929] P. 229.
(2) 127 L. T. 558.
(3) (1874) L. R. 3 P. & M. 136.
(4) [1904] P. 382.
(5) [1925] P. 187, 195.
(6) Ante, p. 221.

a state of desertion has existed at the material time, it must depend upon the circumstances of the individual case whether it is necessary that the petitioner should take any, and what, steps to that end.

Mr. Temple argued that, although the husband had taken no such steps, there was positive evidence from which I ought to infer that the wife was still the deserting spouse, and that the period of her desertion ran afresh after the disposal of the former proceedings. He relied on the husband's evidence that he had not asked his wife to return for the simple reason that he knew she would only sneer at him, and that this was justified by the fact that on the first occasion when they met accidentally while he was driving his omnibus, she had poked her head out of the window of a car and laughed at him; and that on another occasion she had stood and jeered at him as he was driving past; that the only other occasion when he had seen her was when she was served with the petition and she had simply turned and walked away. With this Mr. Temple coupled the husband's evidence that from first to last since she left him the wife has never claimed maintenance of any kind. This is corroborated by the Court records, which show that there has been no claim for alimony in either suit. I think that these are matters which I am entitled to take into account in considering whether the wife's absence after the previous proceedings were disposed of "continued to have the quality of desertion." For these reasons, although I think that, on the facts, the case is very close to the border-line, I find that the husband has proved his case, and I pronounce a decree nisi.

Solicitors: *The King's Proctor; Dehn & Lauderdale.*

W. L.

CLARK *v.* CLARK (No. 2).

1939 *March* 10, 21.

Divorce—Wife's petition—Desertion alleged—Deed of separation—Payments to wife not maintained—Action and judgment for arrears—Deed not repudiated—Supreme Court of Judicature (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*), *as amended by Matrimonial Causes Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2.

About two years after entering into a deed of separation a husband allowed the payments which he had covenanted to make to his wife to fall into arrear. The wife sued for arrears due under the deed and in August, 1935, recovered judgment, which she was unable to enforce. The wife more than three years later petitioned for divorce on the ground of desertion, alleging that the deed was a sham and had been repudiated:—

Held, the wife had made a conclusive election to treat the deed as subsisting by suing and recovering judgment on it, and subsequent events did not justify the Court in the inference that the husband had had the intention to desert his wife for the three years next preceding the wife's petition.

WIFE'S UNDEFENDED PETITION for divorce.

Mrs. Florence Edith Clark, née Lister, married Mr. Sidney John Clark in June, 1918. Differences having arisen, they entered into a deed of separation in common form on February 9, 1933, whereby the husband agreed to pay the wife 35*s*. a week. In 1935 his payments fell into arrear, and she sued on the deed in the county court, and in August, 1935, recovered judgment for the arrears. The judgment was not enforced owing to the husband's leaving the district.

The wife by her petition filed in September, 1938, prayed for the dissolution of her marriage on the ground of desertion without cause for a period of at least three years preceding the petition. She alleged that the husband had repudiated the deed since August, 1935.

G. C. Tyndale for the petitioner. In this case the deed was a sham. The respondent paid for two years, but only under pressure. In *Looker* v. *Looker* (1) Lush J. granted a wife a decree on the grounds of adultery and desertion, where the husband was held to have clearly repudiated the deed by disappearing and making no more of the covenanted payments.

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(1) [1918] P. 132.

[HENN COLLINS J. It has been held in other cases that non-payment is a weak reed by itself on which to find repudiation.]

In *Norman* v. *Norman* (not reported) your Lordship recently held in similar circumstances that a deed was repudiated by non-payment and the husband was guilty of desertion for the statutory period.

[HENN COLLINS J. It was quite clear in that case that in no circumstances would the husband have anything more to do with his wife. The difficulty was to fix the date on which she accepted the repudiation of the deed.]

The judgments in *Smith* v. *Smith* (1) and *Roe* v. *Roe* (2) support my submission that the petitioner is entitled to a decree here.

Cur. adv. vult.

1939. March 21. HENN COLLINS J. This is a wife's petition for divorce on the ground of her husband's desertion. The material facts can be shortly stated. For some years the parties had been living unhappily. The husband had taken to drink and to staying out to all hours of the night or the small hours of the morning, and when the petitioner complained he said that if she didn't like it they had better split up. The petitioner did not want a separation, and would not have consented to part, if her husband had been willing to pull himself together. But, reluctant though she was to separate, she came to this view that, things being as they were, it was the best course.

The husband, who was a clerk in a solicitor's office, then prepared a deed of separation, and an appointment was made at the office of a solicitor, with whom the husband had a professional acquaintance, for the signature of the deed. The latter was not asked and did not take upon himself to advise the wife upon the matter, but be recognized that 30s. a week, which the husband proposed to allow his wife, was

(1) [1915] P. 288.

(2) [1916] P. 163.

too little, and persuaded the husband to make it 35*s*. This amount the solicitor himself inserted in the deed in the blanks left in it for that purpose and the deed was signed by both parties. The spouses thereupon parted.

I am invited in those circumstances to say that this deed was a mere sham on the husband's part, or that it was obtained by duress; and I am asked to disregard it and to say that desertion began from the moment it was signed. I do not think that is the proper view upon the facts, for the husband paid for some considerable time, albeit irregularly and under pressure from the solicitor, and the wife eventually put the deed in suit. Having done so, she cannot now turn round and disavow it as her deed.

By February, 1935, the husband had fallen into arrears with his payments and owed his wife 19*l*. For this amount she sued in the county court and recovered judgment. The judgment, however, proved unproductive. The husband did not pay, and the wife issued a judgment summons. This summons was not served because the husband had left the district; and he has paid nothing since.

Had there been desertion by the husband at that stage? There is nothing, in my view, from which desertion could be inferred except the mere non-payment. The Courts have been slow to regard a mere non-payment, even when a money payment lies at the root of a contract, as evincing an intention not to be bound by the contract, for, unless the withholding of payment is wilful, it has no significance in this relation. I am not satisfied that it was wilful.

But even if I were, it is clear that the petitioner did not treat the deed as being at an end. Quite the contrary. She made a conclusive election to treat it as subsisting by putting it in suit and recovering judgment upon it. The subsequent unserved judgment summons does not affect the matter one way or other. The final election had been made as to all the breaches up to the date of the county court plaint by the county court judgment, and the judgment summons was merely a remedy on that judgment, and not upon the deed.

The desertion must therefore be inferred, if at all, from

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subsequent events. These are, that the husband never communicated with his wife or child before the institution of the suit, nor paid her any money, and that when in September, 1938, he was served with the papers in this suit he said that he had been expecting this; that he had no intention of maintaining his wife again and would be glad to be rid of her.

Desertion is, of course, in essence a matter of intention, and though I should infer from what the husband said when he was served that he was then in intention and in law in a state of desertion, ought I to infer that he had been of that mind for the three years next preceding the suit? I think not. Apart from his words, there is only his failure to pay, which may well have been from mere lack of means, and I can find nothing in his words from which I get any sufficient foundation for the inference that for the past three years he had meant to abandon his wife.

This disposes of the case, but as my own decision in *Norman* v. *Norman* (1) was cited to me as conclusive of this case I take occasion to point out that in that case there was ample evidence of intention on the husband's part to repudiate the separation deed and to desert the wife, and the question was whether the wife must yet fail for lack of proof that she had accepted the repudiation. She had, in that case, not made a conclusive election at any stage before suit, and I gave my reasons for thinking that the burden of proving acceptance of his repudiation of the deed did not lie upon her.

The petition was dismissed.

Solicitors: *Woodcock, Ryland & Parker.*

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(1) Not reported.

W. L.

EDWARDS *v.* QUICKENDEN AND FORESTER.

1939
March 16, 17.

Shipping—Damages—Personal injuries—Collision between an eight and a skiff—Common law and Admiralty rules—Both to blame—"Vessels" propelled by oars—Maritime Conventions Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *ss.* 1, 2, 3—*Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 742.

A collision took place in the River Thames between a single-oared skiff, in which the plaintiff was sculling across the river, and a racing eight owned by a club of which the defendants were officials. The plaintiff claimed damages for personal injuries and damage to his skiff, and the defendants counterclaimed for damage received by the eight. The plaintiff and the cox of the eight were guilty of negligence contributing to the collision.

Under the Maritime Conventions Act, 1911, which is to be construed as one with the Merchant Shipping Acts, 1894 to 1907, where by the fault of two or more vessels damage is caused to the vessels or property or persons on board them, the liability to make good the damage shall be in proportion to the degree in which each vessel was in fault.

By s. 742 of the Merchant Shipping Act, 1894, "Vessel" includes any ship or boat, or any other description of vessel used in navigation; "Ship" includes every description of vessel used in navigation not propelled by oars:—

Held, that no craft propelled by oars was a "Vessel" within the meaning of the Maritime Conventions Act; that the common law rule applied; and therefore, that both the claim and the counterclaim failed.

ACTION of damage transferred from the King's Bench Division.

The plaintiff claimed damages against the secretary and treasurer of the Westminster Bank Rowing Club in respect of a collision in the Thames, near Hammersmith Bridge, on May 8, 1938, between the plaintiff's skiff, a rum-tum, and an eight belonging to the club.

The plaintiff's case was that he was sculling diagonally across and up river against the tide from the north to the south side, and had got within twenty-five yards of the Surrey side when the eight, which had been coming down in midstream, got too far over to the southward and struck him, penetrating his thigh, knocking him into the river, and doing some damage to the skiff.

The plaintiff alleged that the defendants permitted the eight to be steered by a cox who was unskilful and inexperienced and too small of stature to have a safe and proper field of vision. The plaintiff also alleged that the eight was too close to the bank, was on the wrong side of the river, and failed to give way to a single sculler coming up against the tide near to the bank.

According to the defence, the eight was in the course of a row from Duke's Meadows to Putney in about mid-channel, rowing at a rate of thirty strokes a minute, when the plaintiff was seen rowing on a diagonal course across the river upstream and towards the south shore.

The defendants said that the warning cry of "Ahead sculler" was shouted by the defendants' coach, who was bicycling along the towing path on the south bank, that immediately thereafter the defendants' cox gave the order "Hold her, all," and this order was forthwith carried out, but the plaintiff's "rum-tum" came on and with her starboard side about midships struck the eight on the stern, doing her damage.

The defendants counterclaimed in respect of this damage and alleged that the plaintiff failed to keep any lookout, that he attempted to cross in front of the eight, and that, contrary to a usage among persons engaged in rowing or sculling pleasure craft on the Thames that small and easily manageable craft were to keep clear of eights, he failed to keep clear.

Alban Gordon for the plaintiff. Although the action has been transferred to the Admiralty Court from the King's Bench Division, it is an ordinary common law running down case, and, on the facts, the defendants are alone to blame.

Stephen Murray for the defendants. The collision was solely the fault of the plaintiff. If there was any negligence on the part of the defendants it was not a contributing cause of the accident.

[HENN COLLINS J. Do you say that these craft propelled by oars are "vessels" within the Maritime Conventions Act?]

Yes. The Maritime Conventions Act has to be construed together with the Merchant Shipping Act, 1894, and the definition of "vessel" in s. 742 of that Act is very wide, it includes "boats" and "any description of vessel used in navigation." As to the meaning of the words "used in navigation": see *Weeks* v *Ross.* (1)

[HENN COLLINS J. Your difficulty is that the definition of "ship" includes "vessel."]

The words "not propelled by oars" do not appear in the definition of "vessel" but only of "ship." In *Ex parte Ferguson* (2), a sailing coble sometimes propelled by oars was held to be a ship: see also *The Mac.* (3)

But whether the common law or the Admiralty rule is applicable, the plaintiff's negligence was the proximate cause of the damage; he could have avoided the accident at any time up to the last moment before the collision, and the antecedent negligence of the defendants, if there was any, was not mixed up with the plaintiff's negligence so as to make the Admiralty rule of division of loss applicable; the plaintiff is alone to blame: see *The Volute.* (4)

It is common knowledge on the river that the cox of an eight is unsighted to some extent by the men in front of him, and scullers know that, if they get in front of an eight, the cox will not be able to see them; custom, therefore, if not common sense, dictates that small easily managed craft keep clear of a racing eight.

[Reference was also made to *The Blow Boat* (5), *The Upcerne* (6) and *The Gas Float Whitton No. 2.* (7)]

Alban Gordon in reply. Whether the common law or the Admiralty rule be applied the sole question is: Whose negligence was it that substantially caused the collision: see *Swadling* v. *Cooper.* (8) There is no blind spot ahead of the cox of an eight, and, even if it was unwise for the plaintiff to cross the river in the way he did, the defendants had half a mile in which to avoid him, and the damage was due

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(1) [1913] 2 K. B. 229, 233.
(2) (1871) L. R. 6 Q. B. 280, 290.
(3) (1882) 7 P. D. 126.
(4) [1922] 1 A. C. 129, 136.
(5) [1912] P. 217.
(6) [1912] P. 160.
(7) [1897] A. C. 337.
(8) [1931] A. C. 1.

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to their failure to take reasonable care. The nearest case to the present one, although a land collision, is *M'Lean* v. *Bell.* (1)

HENN COLLINS J. In this action Jack Keen Edwards sues the defendants, who are bank officials, and in the circumstances of the case responsible for the safe conduct of an eight, for damages for personal injuries, and a small amount for damages to his craft, on the ground that the accident, which he had the misfortune to suffer, was caused by the negligence of the eight.

Mr. Edwards, on May 8, 1938, set out in a sculling boat, a "rum-tum," from the Middlesex shore, with the intention of rowing up-stream along the opposite, or Surrey bank of the river. As he started, he observed the defendants' eight coming down stream; they were in fact rowing against the watch. He estimated their course and speed, and judged that if they maintained both, he would have time to cross to the Surrey side in front of them. Having made up his mind to that effect, he did not consider the eight any more until just the instant of the collision.

The cox of the eight, on the other hand, saw the sculler in fact starting off from the landing-stage, and, of course, was the only person who could see, but he formed no opinion as to which way the sculler was intending to go, and from that moment on, until practically the moment of impact—certainly when it was too late to do anything effective to avoid the collision—those in the eight never saw the sculler at all. It is in those circumstances that the plaintiff alleges that the defendants were negligent, and the question I have to determine is, putting it in quite popular, but I think accurate, language: Whose fault was it; was it the fault exclusively of one, or the other, or was it the fault in some measure of both?

If the common law rule is the one by which the case is to be determined, then unless one or other is solely to blame neither can recover; if the plaintiff himself was negligent, the plaintiff would not be able to recover on his claim, nor would the defendants, if they were to blame, be entitled to recover the small amount which they counterclaim in respect of injury to their craft.

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(1) (1932) 48 Times L. R. 467.

If, on the other hand, the Admiralty rule were to apply, then the negligence of either party is not a complete bar to recovery, but the blame would have to be apportioned.

The plaintiff's case, as I see it, is, and must be, that he would have been all right, that his judgment was in fact perfectly right, had not the eight steered a course which he had no reason to expect, and which was such a deviation from the normal course of eights in those circumstances as in itself to be a negligent course to steer. That is not all he says, but having listened to the evidence and the arguments addressed to me, I think that is the substance of it. He said himself that his complaint was that the eight had got over too far to the Surrey shore, which, of course, one can see would have put him out of the calculation on which he based himself. He said towards the end of his evidence: "I "was prudent, I had time to cross in front on the assumption "that the eight held the middle of the stream. My complaint "is that it did not keep to that course."

Having great confidence in his own judgment, founded on that expectation, he never paid any further attention to what the eight was or might be doing. What he did was to look over his right shoulder from which he could get no view of the eight at all, his purpose being merely to see that he kept his course; in other words, having made up his mind that it was safe to cross, he took no further precaution, and the accident happened.

I am going to assume for the purpose of considering his case that the eight was in fact over on the Surrey side, where he did not expect it to be. I will even assume that that was a negligent course for the eight to take, but I must also recognize that an eight coming down in those circumstances is a much less easily controlled and guided vessel than the one he was in, and I do not think anybody could reasonably acquit the plaintiff of all negligence in not in those

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circumstances avoiding the accident. If he had looked to see what he was doing, he would have been able to avoid the eight almost at any stage in his passage across the river, and I think that the real and substantial error on his part was not looking to see that the eight was doing what he expected it to do, and doing that which alone, so to speak, could justify his confident and blind course across the river. He does not himself recognize any convention that light manageable craft should avoid eights, nor do I think that any of these conventions or rules of the road have anything like the force of the laws of navigation; they are just conventions by which people should measure their conduct, and I am not going to say that the mere deviation from any of them is itself negligence, much less the negligence which leads to the accident. I am, however, of opinion that in these circumstances the plaintiff did in fact contribute to the accident which overtook him, even on the assumption that the eight steered a negligent course; but it is, of course, for him to satisfy me of that fact, and the impression on my mind is that he had not in fact got so far over as he thinks he had. On the other hand, I am far from satisfied that the eight was so happily placed upon the median line, which for my convenience and not for theirs, was drawn down the middle of the plan, as the crosses marked by the witnesses indicate. There are five of them on my plan. I cannot help thinking that those crosses would not have been in such a perfect line but for the help of the Ordnance survey. However, I do not think the eight was so far over as to constitute any negligence on their part merely by reason of their position.

[His Lordship dealt with the evidence of two of the witnesses and continued as follows:]

The impression left upon my mind, weighing one witness with another is that although the eight were not on the middle line, they were not so far off the middle line as to be a negligent course, or one which the plaintiff ought not reasonably to have anticipated, or, at any rate, provided against by looking where the eight was going. That, of course, in the common law view, disentitles the plaintiff to recover upon his claim, and on the common law rule, one must consider whether the defendants are entitled to recover on their counterclaim.

What they say is that the accident was solely caused by the kind of negligence that I have indicated and found on the part of the plaintiff, and that in those circumstances, nothing they could reasonably do would have avoided the consequences of his negligence. They base that upon the fact, or on the suggestion, that the cox of the eight is necessarily unsighted over a considerable angle, and that by reason of the turn of the river, and the course that the eight and the plaintiff's "rum-tum" were steering, he, the plaintiff, was always within the blind area of the cox.

I do not accept that view. I think it was quite possible for the cox, if he had not been looking more intently at other things, to have seen what course the sculler was making, and it was not right of him to assume that the sculler was going to keep out of the way of the eight. It may have been the proper thing for the sculler to have done, but that does not relieve the eight, as I see it, from taking steps to avoid the consequences of that negligence. It is rather an alarming proposition to be told that an eight travelling at speed is quite incapable of avoiding objects that are lying low on the water unless they are quite a considerable way to one side of it, and I do not believe, taking it at its highest, that the evidence goes to that at all.

Mr. Beresford (the amateur sculling champion) gave me the clearest account of the matter. He convinced me that there is a very considerable difference between the view which a cox will get when the oarmen's seats are staggered and those which now prevail down the centre of the boat, but he also convinced me that the cox gets intermittent glances of what lies straight ahead, because he said that an eight is always yawing a little, and during those intervals it opens up a small vista of sight. I cannot believe that in fact a cox who can see a boat that sets off from one side of the river to the other, at a distance of half a mile, can never see it again.

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But if it be true, then, it seems to me, that the sooner that is altered the better; and I do not think the eight would be relieved because in fact they choose to navigate a craft which in those circumstances is dangerous. I find that they also are to blame, and at common law cannot recover on their counterclaim.

There only remains the question of whether the common law or the Admiralty rule should prevail. In my opinion, it is the common law and nothing else. The Maritime Conventions Act is not applicable because, in my opinion, these craft, to use a neutral term, are not "vessels" to which the Convention applies, by reason of the definition in s. 742 of the Merchant Shipping Act, 1894. That section is in these terms: "In this Act, unless the context otherwise requires, the following "expressions have the meanings hereby assigned to them: "(that is to say) 'Vessel' includes any ship or boat, or any "other description of vessel used in navigation; 'Ship' "includes every description of vessel used in navigation not "propelled by oars."

I am invited to say that though these craft were in fact propelled by oars, they are not within the definition "ships propelled by oars." The difficulty I have in drawing that conclusion is that the definition, "ship" includes or embraces every description of vessel, which includes in turn, if one refers back to the definition "vessel," "any ship or boat"; but by the definition of "ship" any vessel of any description is only included if it is not propelled by oars. In other words, no vessel which is propelled by oars is within the definition "vessel."

For these reasons I think that the common law rule applies with the result that I have mentioned.

Solicitors for the plaintiff: *Berry Tompkins & Co.*

Solicitors for the defendants: *Edward & Childs.*

E. C. M. T.

SHAW *v.* SHAW.

1939
March 27;
April 3.

Divorce—Wife's petition on ground of desertion—No cohabitation since marriage and no consummation—Desertion by husband—Supreme Court of Judicature (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*), *as amended by the Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2.

After a clandestine marriage the parties agreed to continue living with their parents for a short time until the husband could afford to set up a home. When he obtained employment, he failed to comply with the repeated requests of his wife to make a home for them, and in fact there was never any cohabitation and the marriage was not consummated. The wife petitioned for divorce on the ground of desertion:—

Held, a spouse who without cause refused to start cohabitation after the expiration of an agreement merely to postpone its inception could be guilty of desertion. A decree nisi was pronounced.

WIFE'S PETITION for divorce on the ground of desertion for at least three years immediately preceding the petition.

[The suit was undefended. The facts are embodied in the judgment.]

Victor Williams for the petitioner.

Cur. adv. vult.

1939. April 3. THE PRESIDENT (SIR BOYD MERRIMAN). This is a wife's undefended petition for divorce on the ground that her husband has deserted her without cause for a period of at least three years immediately preceding the presentation of the petition, which was filed on November 7, 1938.

The wife's evidence showed that the marriage had not been consummated, that there had been no cohabitation of any kind, and that, in the first instance at any rate, she had consented to this state of things. There was no charge of wilful refusal to consummate the marriage, nor was any evidence directed specifically to this aspect of the matter.

As there is no authority, so far as I am aware, directly in point, I adjourned the case for further consideration. Having now had an opportunity of considering the authorities to which counsel, at my request, has since referred me, I have come to the conclusion that it is unnecessary to call for further argument before giving judgment.

I find the facts to be as follows: The parties were married on April 4, 1930, having known each other for some four years. The wife was living with her mother, but she had an income of her own, amounting to about 250*l.* per annum. At the time of the marriage the husband was not in work and, for this reason, he suggested that they should continue to live with their respective parents, and that until he was earning money the marriage should be kept secret from them. The wife assented to this suggestion, but I believe her evidence that she assented expressly upon the footing that this arrangement should only last for a short time. Not long after the marriage her husband got employment at 4*l.* per week. Thereupon the wife asked him to set up house and offered to contribute to the expenses out of her own income. The husband, however, refused on the pretext that he wished to be entirely responsible for keeping up the matrimonial home, and that he was not then in a position to do so.

In October, 1930, the wife accompanied her mother to India, still concealing the fact that she was married. She returned to England in May, 1931, and again pressed the husband to make a home for her. He was then unemployed and again refused to do so, whereupon she returned to her mother in India. Between their return to England in July, 1932, and the year 1934, the wife repeatedly pressed her husband to make a home, but he always refused to do so. From the last of these requests in 1934 until 1937 the spouses never even met, and it was not until the latter year that the wife first told her mother about the marriage. I gathered that it was the publicity given to the passage of the Matrimonial Causes Act, 1937, which led to her making the disclosure then.

Eventually on September 19, 1938, the wife wrote a letter to the husband, on her solicitor's advice, referring to her

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previous requests that they should live together on what they had and to his refusals, and making a final demand that he should make a home so that they could live together in the ordinary way as husband and wife. If not, she said, she must apply for her freedom. In reply she received a telegram to the effect that the husband did not intend to do anything.

From this statement of the facts it will be seen that this case affords yet another example of the difficulty created by the passage in the judgment of Lord Penzance in *Fitzgerald* v. *Fitzgerald* (1) which reads: "No one can desert who does not "actively and wilfully bring to an end an existing state of "cohabitation." It has often been explained that the passage from which this extract is quoted cannot be taken to be exhaustive. But in *Bradshaw* v. *Bradshaw* (2), a judgment of the Divisional Court, Sir Francis Jeune, in explaining the limitations to be placed upon *Fitzgerald* v. *Fitzgerald* (1) and *Reg.* v. *Leresche* (3) said: "The two cases cited have one "common feature: in each of them there were two persons "living separate from each other by mutual consent, and not "cohabiting together, and in such a case there clearly could "not be desertion unless there were a resumption of co-"habitation." I do not think, however, that the learned President was intending to refer to cases in which the parties had agreed to separate only for a limited time or for some temporary reason.

Indeed, in an earlier case, *Mahoney* v. *M'Carthy* (4) he had dealt expressly with that situation as follows: "In the "first place, was there any desertion at all? It is clear that "the husband left the country with his wife's consent. That "is admitted by the plaintiff's witnesses. It is further, "indeed, urged on behalf of the husband that the case of "*Fitzgerald* v. *Fitzgerald* (1) shews that there must be a "resumption of cohabitation before there can be desertion. "I cannot, however, agree that that is so, because though it "may be perfectly true that if there has been a separation

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(1) (1869) L. R. 1 P. & M. 694, 698.

(2) [1897] P. 25, 27.

(3) [1891] 2 Q. B. 418.

(4) [1892] P. 21, 25.

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"by consent, that is to say, an agreement to live separate, "there cannot be desertion without a return to cohabitation, "such a rule does not apply where the absence has not been "in pursuance of an agreement to live separate, but merely "for a temporary reason and amounting only to a temporary "separation."

It is clear from this case, and from the cases of *Smith* v. *Smith* (1) and *Sifton* v. *Sifton* (2), that if cohabitation has ceased by agreement, only for a limited time or for a particular reason, that spouse is guilty of desertion who, without cause, refuses to resume cohabitation at the expiration of the time or the cessation of the reason for the separation. It is also settled by *De Laubenque* v. *De Laubenque* (3) that a spouse may be guilty of desertion, in spite of the fact that the marriage has not been consummated, and that cohabitation has never begun, if that state of things is brought about by his or her fault. In *Buckmaster* v. *Buckmaster* (4) the wife only failed, in similar circumstances, because she had bargained away her rights for a money consideration. It seems to me to follow that a spouse who without excuse refuses to start cohabitation after the expiration of an agreement merely to postpone its inception can also be guilty of desertion.

I think that that is the case here. Although the wife might probably have brought matters to a head by an earlier disclosure of the situation to her mother and would have been on surer ground had she done so, I think that the true position is that, at the most, she assented to the non-cohabitation for a short time only, and that any reasonable limit of such period was reached when the husband refused to make a home, though he was earning money and she was willing to contribute out of her own income. From that time I think that the husband began to desert his wife, and continued to do so in spite of her requests for a home and a proper married life.

It is true that for considerably more than three years before the presentation of the petition the wife had ceased even to make those requests, and that the spouses had ceased to meet.

(1) (1888) 58 L. T. 639.
(2) Ante, p. 221.
(3) [1899] P. 42.
(4) (1869) L. R. 1 P. & M. 713.

But I do not think it would be right to draw the inference that she ever acquiesced in the husband's refusal of her demands; and her failure to take steps to enforce her rights is, I think, explained by the fact that, having regard to her evidence as to the monetary position, any proceedings with the ultimate object of obtaining maintenance would necessarily have been fruitless. For these reasons I think that the wife has proved her case, and I pronounce a decree nisi accordingly, with costs.

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Solicitors: *Withers & Co.*

W. L.

1939
April 5.

BENNETT *v.* BENNETT (BY HER GUARDIAN).

Divorce—Husband's petition on ground of desertion—Continuing desertion from 1905 *to* 1936*—Wife then certified insane—Petition filed eighteen months later—Burden on husband of proving wife's capacity to form a rational intention of continuing to desert—Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*), *as amended by Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2.

A wife deserted her husband and continued to desert him for thirty-one years when she was certified insane. About eighteen months after her certification her husband petitioned for divorce on the ground of desertion for at least three years immediately preceding the petition :—

Held, the wife's insanity raised the presumption that she was no longer capable of forming a reasoned judgment as to her relations with her husband. After she had been certified as insane, the burden of proof that she retained a rational intention to desert her husband rested on him. He had not discharged that burden. The petition was dismissed.

HUSBAND'S PETITION for divorce.

The parties were married in July, 1901. The wife deserted her husband in 1905 and she had never resumed cohabitation with him or sought to do so. In December, 1936, she was certified as insane and had been in a mental home ever since. On April 26, 1938, the husband filed his petition for dissolution of marriage on the ground of desertion for at least three years immediately preceding the presentation of the petition. The wife, by her guardian ad litem, the Official Solicitor, denied the charge.

The material facts and the arguments are set out in the judgment.

Roland Adams for the petitioner.
Theodore Turner for the respondent.

Cur. adv. vult.

1939. April 5. BUCKNILL J. delivered judgment as follows : In this case the petitioner, William Bennett, petitions for dissolution of his marriage to May Gertrude Bennett on the ground that she has deserted him without cause for a period of at least three years immediately preceding the presentation of this petition ; the petition was presented on April 26, 1938. On August 26, 1938, the respondent, by the Official Solicitor, her guardian ad litem, filed an answer denying that she had deserted the petitioner as alleged in the petition.

The facts of the case material to this inquiry are these, that on July 16, 1901, the petitioner married the respondent. There is one child of the marriage, born in 1902, and, according to the evidence of the petitioner, the wife left the home and went to her parents on several occasions before she finally left him in December, 1905. He said that she had always wanted to get away, and that after 1905 he only saw her, I think, on one occasion, when she said she did not care in the least ; he was, in fact, ill at the time. He called to corroborate him his son by an earlier marriage, who said that before the wife left she was not satisfied with her husband and there was no reasonable ground for dissatisfaction. After she left there was some attempt at a separation agreement which fell through and the husband paid nothing for his wife's maintenance until she was certified as insane in December, 1936. For thirty-one years, the evidence establishes, and I accept the evidence of the petitioner, who gave his evidence well, that the wife deserted the husband.

The difficulty in the case is that the statute only gives the petitioner a right to have his marriage dissolved if he satisfies the Court that his wife has deserted him without cause for at least three years immediately preceding the presentation of the petition. For eighteen months before the petition was presented she was in a mental hospital certified as insane. That, of course, places the Court to start with in a difficulty, because the Court has to be satisfied on the evidence that the case has been proved, and it is a little difficult to see how the Court can be satisfied when one of the parties is unable to appear here and give her version of what happened in relation to the withdrawal from the matrimonial home. I do not know that that is necessarily conclusive of the matter, but it does place the Court in a difficulty. Moreover, there is a case, cited by Langton J. in *Williams* v. *Williams* (1), a case very similar to this, which Mr. Adams (who appeared for the petitioner and put forward a most careful and courageous argument) had to fight to get over. The case is *Jones* v. *Newtown and Llanidloes Guardians*. (2) It is quite true, as Mr. Adams pointed out, that that was not a case in which the point to be decided by the Court was whether the wife had deserted the husband without cause for the three years necessary to give him the right to a decree, because in 1920 there was no right in this country to get a decree of dissolution on the ground of desertion.

The point decided by the Divisional Court was whether a husband, who had been deserted by his wife, was liable to support her after she had become certified as a lunatic. The language used by Lord Reading C.J., in that case seems to apply to the present case in principle. I do not wish to read a great deal of the judgment, but I must read this passage in his judgment : " the relief of the husband from the obligation "of maintenance continues only so long as she voluntarily "remains absent. Her absence, although wrongful, does "not affect the relationship of husband and wife. She is "entitled after however long a period of absence to return "at any time. There is in the present case no suggestion of "the wife having misconducted herself in the sense of having "committed adultery. She simply left her home and lived "apart. Suppose she were to recover from her insanity and "elect to return, it seems clear that the husband would be "bound to maintain her. Nothing has happened to dissolve "the relationship of husband and wife. Here the wife has "become a lunatic and continues to be insane. She is "therefore unable to exercise any judgment. She cannot "elect to return home, and while in that condition she "becomes chargeable to the union. In those circumstances "who ought to support her—the ratepayers or the husband? "I think the answer is that so long as the relationship of "husband and wife continues it is the husband."

(1) [1939] W. N. 107.

(2) [1920] 3 K. B. 381, 384.

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Mr. Adams took two points. He said first of all that the basis of the judgment in *Jones* v. *Newtown and Llanidloes Guardians* (1), was that the wife was entitled to elect to return at any time during the desertion and, that being so, the husband remained liable to maintain her during the time she was insane and unable to form a rational election of that kind. But, said Mr. Adams, in the present case the wife has behaved in such a way to her husband by deserting him on several occasions shortly after the married life had started and finally staying away from him whilst sane for thirty-one years, that he would be entitled to take the point that she has put herself, so to speak, outside the pale of repentance; that she could not be heard to say now after all these years that she wanted to return to her husband, and, therefore, the question as to her right to elect to return does not arise in this case.

That, of course, is a question of fact. He cited in support of his argument two cases: *Thomas* v. *Thomas* (2), and *Bowron* v. *Bowron*. (3) In each of those cases the husband had been cruel to the wife and behaved to her in such a way that she was forced to leave him. In *Thomas* v. *Thomas* (2), which is perhaps the most helpful to Mr. Adams, there is evidence that the husband, after the wife had left him for good grounds, made serious efforts to get her back, and the Court held that notwithstanding those efforts to get her back and notwithstanding his protestations of repentance she was entitled to refuse to return to him. As the Master of the Rolls pointed out in that case (4), "That conduct is not necessarily "wiped out by a letter of invitation to the wife to return. "It must be for those who hear the whole evidence to decide "whether the conduct amounting to desertion is no longer to "be regarded, so that there is no excuse for the refusal of the "other spouse to return."

In the present case before me there was certainly no question of cruelty or anything of that kind, and on the petitioner's own case there was nothing, as far as I can see,

(1) [1920] 3 K. B. 381.
(2) [1924] P. 194.
(3) [1925] P. 187.
(4) [1924] P. 199.

which precluded the wife from forming an honest intention to return at any time. If she communicates that intention to her husband, she would then cease to be in a state of desertion so far as she was concerned. I do not think it necessarily follows that after thirty-one years of desertion the Court would order a husband to take her back if a suit for restitution of conjugal rights was commenced by her, but that seems to me to be rather a different point. I cannot see why the wife should not at any time during those thirty-one years take herself out of the category of desertion by forming an honest intention to return and by communicating that intention to her spouse.

The second point which Mr. Adams took was this: That in *Jones* v. *Newtown and Llanidloes Guardians* (1) the Court, if it intended to lay down an absolutely hard and fast rule that in no circumstances could a person once certified as insane retain an intention to desert, went too far. It seems to me that in this case the question is one of fact and can be stated in this way: Did the wife during the time she was insane intend to desert her husband? And, if so, was such an intention based on a rational view of the material circumstances? It may be that the judgment of the Divisional Court in *Jones* v. *Newtown and Llanidloes Guardians* (1), did not intend to lay down any such hard and fast rule as may be implied at first from the very wide words which were used. It may be that the fact of the wife's insanity does not in itself raise an irrebuttable presumption of law that after becoming insane she is at all times unable to form a rational intention to live apart from her husband. Although insane on certain well defined subjects, she may remain sane on the subject of whether in her view cohabitation with her husband is intolerable to her, a view which she held for thirty-one sane years of her life and which was, presumably, based on her dislike for married life with him. Moreover, such an irrebuttable presumption would make no allowance for the fact that the wife may have frequent and prolonged lucid intervals during which she steadily refuses to listen to the importunings of her husband to return to cohabitation.

(1) [1920] 3 K. B. 381.

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Desertion is a continuing offence and, when the wife formed the intention to desert and acted upon it, the intention remained and, in my view, is presumed to continue until the wife proves a sincere desire on her part to return to cohabitation and make a reasonable effort to act upon such a change of mind.

In this case, when the wife, after deserting her husband for thirty-one years, was eventually certified as insane, it seems to me that such insanity raises the presumption that she was no longer capable of forming any reasoned judgment on the matter of her relations with her husband. When she became insane, her intention to desert came to an end unless it is proved that, although certified as insane, on the question of cohabitation with her husband she remained capable of forming a reasoned judgment. In other words, after the wife has been certified as insane, the burden of proof that she retained a rational intention to desert her husband rests on the petitioner.

At that point the doctor, in whose care the respondent is, was called as a witness before me. He said he communicated the contents of the petition to the respondent. That was not done because in his view he thought she was of necessity in a fit state to receive it, but because it is the practice in every case to do so unless the procedure would do some harm to the state of mind of a patient. He said that she appreciated the purport of the document and said she did not " give a damn " as long as there was no slur on her character. She had never been in any mental home before she came to that institution in December, 1936. Later on the doctor saw her again and asked her if she could remember what had happened about it, and she said she had forgotten, and then she remembered and became very abusive and said, referring to the divorce and her husband, " Just serves him "bloody well right." " I asked her," the doctor said, " if "she wished to return to her husband, that is before I served "the petition, and she said that she did not wish to return. "Her mental disorder is caused by excessive alcohol. She "is not capable of forming any reasoned judgment ; she is

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"still certifiably insane; she suffers from gross disorder of "memory and her emotions varied in an irrational way."

On that view of the rule, which I venture to think is applicable in a case of this kind, the husband has not discharged the burden of proof that the wife, after she had become insane, had continued to exercise a reasoned judgment or had been able to form a rational intention as to cohabitation with her husband, and therefore she cannot be said to have deserted her husband during the period of her insanity, namely, from December, 1936, until the petition was presented.

This is, in my view, a hard case, and if I could see my way to grant a decree I would gladly do so, for the wife whilst sane in fact deserted her husband for thirty-one years. Moreover, the reasoning which leads me to refuse a decree would apply if a wife after those thirty-one years had been certified as insane for a week or even a day before the petition was presented. The words of the statute are too plain: before a decree of dissolution can be granted for desertion there must be desertion for three years immediately preceding the presentation of the petition. If these plain words cause cases of hardship, such as the preamble of the Act was intended to refer to and which the Act was intended to remove, then it is for Parliament to amend the law.

The petition was dismissed, with an order that the petitioner should pay the costs of the Official Solicitor as guardian ad litem.

Solicitors: *Clapham, Fraser & Williams; The Official Solicitor.*

W. L.

[IN THE CONSISTORY COURT OF LONDON.]

In re ST. JOHN, HAMPSTEAD.

1939
March 11, 25.

Ecclesiastical law—Faculty—Erection of columbarium on site in consecrated burial ground—Site of columbarium useless for burials—Disused burial ground—Disused Burial Grounds Act, 1884 (47 & 48 *Vict. c.* 72), *s.* 3.

A faculty was sought authorizing the erection of a building, a columbarium, on a site which formed part of a consecrated burial ground. An Order in Council had closed the burial ground except for burials in private vaults or in graves of specified minimum depth. The site of the proposed building was useless for burial purposes :—

Held, that the columbarium could not be treated as an above-ground vault or an extension of the burial ground, nor was the placing of ashes in an urn and the storage of the latter an interment.

Held, further, that the site was a disused burial ground, and, consequently, the erection of a building thereon would be contrary to s. 3 of the Disused Burial Grounds Act, 1884. A faculty was therefore refused.

In re Ponsford and Newport District School Board [1894] 1 Ch. 454 followed.

PETITION for a faculty.

The faculty prayed for was to erect a columbarium to receive the ashes of parishioners of St. John, Hampstead, who had been cremated. This was to be a brick building 40 feet long, 10 feet 6 inches in depth, and 16 feet in height. The proposed site was on a part of the consecrated burial ground which for certain physical reasons was useless for burial purposes. The application was by the vicar and churchwardens, and there was no opposition. Two Orders in Council had been made partly closing the burial ground, and confining burials to private vaults and graves of a minimum specified depth.

W. S. Wigglesworth for the applicants. This burial ground was provided by an Act of 1810 (50 Geo. 3, c. lxxi.), under which trustees were appointed, and they were empowered by s. 12 "to make and build such vaults or other conveniencies for "the interment of the dead, as they shall think necessary "and proper." This columbarium is not a building in the ordinary sense, but is really a perpendicular extension of the burial ground, and is a general vault or convenience for the interment of the dead within the meaning of s. 12. It is the duty of the trustees to use this ground for the burial of the dead; they cannot do so on this particular piece of ground, and should be permitted to do the next best thing. The disposal of the ashes is closely akin to the burial of the dead.

No doubt nothing but an Act of Parliament can authorize the use of consecrated ground for a secular purpose. But burial is an ecclesiastical purpose, and in *Corke* v. *Rainger* (1) the Court of Arches held that a consistory court had power to grant a faculty to erect public elementary schools on consecrated ground because religious instruction according to the principles of the Church of England was to be given therein, which was an ecclesiastical purpose. It is submitted that s. 3 of the Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), does not apply. St. John's burial ground is not a disused burial ground. No Order in Council has closed it entirely, and it is still used for burials. In any case the purpose for which the ground to be used as the site of the columbarium was consecrated, namely burials, is exhausted, and a faculty for its use for even secular purposes can be granted: see Cripps on Church and Clergy, 8th ed., p. 243.

No one appeared to oppose.

Cur. adv. vult.

1939. March 25. THE CHANCELLOR (MR. F. H. L. ERRINGTON) read the following judgment: The question involved in this application is one of some interest and importance. The additional burial ground of St. John, Hampstead, which it concerns was provided for the parish by an Act, 50 Geo. 3, c. lxxi. It is situate on the east side of and having a frontage of some 115 yards to Holly Walk. The burial ground is consecrated, and vested in the vicar and churchwardens, but is managed by trustees appointed under the Act (s. 1). Many people, eminent in their day and still remembered, are buried there; among them the du Mauriers, father and son, Sir Herbert and Lady Tree, and Sir John

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(1) [1912] P. 69.

Hare. The ground is admirably kept, and at least of late years the income has so far exceeded the expenditure that a reserve fund has been formed, and this notwithstanding that the burial ground was partly closed for burials by two Orders in Council. Since the last Order, which is dated January 15, 1875, burials are only allowed in certain private vaults and in graves not less than five feet deep. It is expected that within the next seven years no further burials will be possible, and that owing to the loss of income, it will be difficult to maintain the ground in its present good order and condition ; nor will there be the same facilities for the burial of parishioners. There are, however, strips of land of varying dimensions included within the area which for various reasons are unsuitable for burials and have been left vacant. In particular there is at the north-east corner a piece of land which by reason of its steep decline, ending in a sort of gully, is useless for burial purposes. It is desired to build here what is called, not I think very happily, a columbarium, to receive the ashes of parishioners whose bodies have been cremated. In length it would be 40 feet ; in depth at the centre 10 feet 6 inches ; and in height to the top of the roof 16 feet. It would contain two recesses in which two hundred urns could be placed, and there would be space for three hundred tablets commemorative of the persons whose ashes were so deposited, or had received actual burial. The material used would be buff-coloured bricks with Portland stone dressings, and oak beams. The cost would be about 1000*l.* which is already in the hands of the trustees. The income derived from its use is estimated to be amply sufficient to provide for the upkeep of the burial ground, including this building, for many years to come. The application is by the vicar and churchwardens and is supported by the trustees and by the parochial church council, and there is no opposition.

The question is put to me as one for my discretion. It is said that the building is merely an extension of the burial ground perpendicularly instead of horizontally, and that the columbarium in its general aspect can be regarded as an above-ground vault. Even so I should find difficulties. If

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such disposal of the ashes connotes a burial or interment in a vault, it would seem to be forbidden by the Order in Council, which only permits of burial in a private vault. If it is not a burial or interment, the committal portion of the Burial Service, which is generally and can legally be used at the burial of ashes (*In re Dixon* (1)), would appear to be singularly inappropriate.

In my opinion, however, it is impossible to regard the building as part of or an extension of the burial ground. Under the Act the trustees were authorized to make and build such vaults and other conveniences for the interment of the dead as they should think necessary and proper ; and I cannot consider the placing of ashes in an urn, still less its contemplated storage, to be an interment. Even if these difficulties could be got over, I have come to the conclusion that I have no discretion, but am bound by the Disused Burial Grounds Act, 1884, to refuse the application. Before the passing of that Act many faculties had been granted for the erection of mortuaries and school buildings on closed burial grounds. The Act, which is closely linked up with the various Open Spaces Acts, was an Act for preventing the erection of buildings on disused burial grounds, and s. 3 is as follows : "It shall "not be lawful to erect any buildings upon any disused burial "ground, except for the purpose of enlarging a church, chapel, "meeting house, or other places of worship." The Act applies to both consecrated and unconsecrated ground. The proposed columbarium is plainly a building and does not come within the exceptions. It is contended, however, that inasmuch as burials still take place in the burial ground, it is not a disused burial ground within the meaning of the Act. Were there not authorities which to my mind decide the contrary, there would be considerable force in that contention, though even so I should much doubt my jurisdiction to authorize the erection on a consecrated burial ground of a building not really ecclesiastical in its character ; but, however that may be, I think the Act prevails.

Under the original definition clause contained in s. 2 of the

(1) [1892] P. 386.

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Act, the expression "disused burial ground" meant only "a burial ground in respect of which an Order in Council has "been made for the discontinuance of burials therein." This definition was afterwards considerably enlarged, and a "disused burial ground" now means, according to the judgment of Kay L.J. in the case of *In re Ponsford and Newport District School Board* (1), "a piece of ground set apart for interments "in which interments have or have not taken place, whether "it has been partially or wholly closed under any statute or "Order in Council, or has become otherwise disused." The case was one of a cemetery owned by a company. One part of it had been used for burials, the other part had not; and in the year 1887 a wall was built separating the unused portion of the cemetery from the used portion. By an Order in Council burials were ordered to be discontinued except in the unused part. Under a power contained in their deed of settlement to sell any part of the property which for the time being appeared inapplicable for their purposes, the company sold the unused land, and the question of building on it arose. The Court of Appeal held that the piece of land in question, though only part of the land set apart for interments and never buried in, came within the Act as a disused burial ground. In the course of his judgment Kay L.J. said (2): "This ground was set apart as distinctly as any ground could "be, though it is ground in which no burials have ever taken "place. I cannot escape the conclusion that this ground is "within the express words of the Acts of Parliament; that "this was ground set apart for interments; although no "interments have ever taken place in it, this is, therefore, "'a disused burial ground' within the Act of 1884, and the "restriction in the Act of 1884 applies to this ground. Unless "that is the conclusion to be drawn from the words of this "Act of 1884, the result would be this—that a piece of ground "in the middle of a cemetery, or in any part of a cemetery, "in which there may have been no burials, cannot be treated "as a disused burial ground."

This decision was followed in the case of *London County*

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(1) [1894] 1 Ch. 454, 467.

(2) Ibid. 468.

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Council v. *Greenwich Corporation.* (1) Here there had been no closing order in respect of the burial ground and it was contended that the particular piece of land in question, in which there had been no burials, was not a disused burial ground, because it was an unseparated part of a whole burial ground still partly used; but it was held by Astbury J., following the *Ponsford* case (2) and referring particularly to the passage cited above (3), that the piece of land came within the Act. I have read these cases as deciding that the Act applies as much to a disused part (however small) of a burial ground as to a disused whole.

I have been referred to the case of *Corke* v. *Rainger* (4), where the Dean of the Arches authorized the erection on consecrated ground of a non-provided public elementary school; but the ground in question, though consecrated at the same time as the church, had not been consecrated as a burial ground, and according to the learned judge was neither a disused churchyard nor a churchyard at all. The Act of 1884 was not even referred to, and reliance was chiefly placed on *In re Bettison* (5), decided in 1874, and *In re The Parish of Bideford* (6), in which no building operation was involved. I can only regard the first-named case as an authority for allowing a building for an ecclesiastical purpose to be erected on consecrated ground other than a burial ground.

I cannot distinguish the *Ponsford* case (2) and the *Greenwich* case (1) from the present. Moreover they appear to me when read with the Act to lay down a general principle which is of benefit to the public, though increasingly departed from in private bill legislation, namely that burial grounds whether technically within the Open Spaces Acts or not should be and remain unbuilt upon except for the special purposes enumerated in the Act. It would indeed seem inconsistent to provide for green belts outside towns and to impinge on green spaces within.

(1) [1929] 1 Ch. 305.
(2) [1894] 1 Ch. 454.
(3) Ibid. 468.
(4) [1912] P. 69, 75.
(5) (1874) L. R. 4 A. & E. 294.
(6) [1900] P. 314.

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St. John, Hampstead, *In re*

The Chancellor.

In view of the Act and on the authority of these cases I must dismiss the petition. I regret the probable financial loss. It has, however, long been decided that a closing order does not prevent the burial of cremated remains: *In re Kerr* (1); and it may well be that advantage of this exception will be more freely taken in the future with a resulting increase of income. If within a reasonable time, say six months, and without infringing the Act, provision can be made in the burial ground for the placing of tablets commemorative of such burials, this petition can for that purpose be amended and restored to the list.

Solicitors for applicants: *Monro, Saw & Co.*

W. L. L. B.

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(1) [1894] P. 284.

Followed. Beeken *v.* Beeken. [1948] P. 302

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July 21, 28,

PARDY *v.* PARDY.

Divorce—Desertion—Wife's petition—Deed of separation—Repudiation of deed by husband—Acquiescence in repudiation by wife—Not a bar to divorce—Supreme Court of Judicature (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*), *as amended by Matrimonial Causes Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *s.* 57), *s.* 2.

The appellant and her husband, the respondent, were married on September 29, 1928. They went to live at the house of the respondent's parents. Almost from the first the husband neglected his wife and drank rather heavily. On May 30, 1932, they executed a deed of separation, one of the terms of which was that the husband should pay the appellant 1*l*. 5*s*. a week. He ceased to make these payments in September of that year, and the last payment of any kind that he made to her was on November 5, 1934. In July, 1935, and on several subsequent occasions, the appellant committed adultery. On July 5, 1937, the appellant met the respondent by appointment and made it clear to him that she wanted him to provide a home for her, but he made no offer whatever:—

Held (reversing the decision of Langton J.), that the respondent had repudiated the deed of separation, that the appellant had acquiesced in such repudiation, and that, therefore, she was entitled to the decree she asked for.

Wife's Undefended Petition for divorce.

The following statement of facts is taken from the judgment of Langton J. The petitioner in this case married her husband, the respondent, on September 29, 1928. The parties went to live at the house of the husband's parents. The petitioner consented to this course on the understanding that the arrangement would be a temporary one until her husband should be able to provide a home of his own. The husband was a chartered accountant and was apparently in a sufficiently good position to be able to look forward to providing a separate establishment at a reasonably early date. From the outset the marriage was unhappy, and at the end of the first year had become a failure. The respondent kept his wife exceedingly short of money, stayed out at night, drank rather heavily and neglected his wife. In July, 1930, the petitioner, at her husband's suggestion, took a temporary post in the City of London, and in the following month, August, took up a permanent position there in which she has continued up to the present time.

During the next eighteen months the respondent continued to neglect his wife and relations between them steadily deteriorated. The petitioner found this situation intolerable, and eventually a deed of separation, couched in the ordinary terms, was signed on May 30, 1932. The petitioner thereafter took up a separate abode and has lived apart from her husband ever since. It was a term of the deed that the respondent should pay to his wife the sum of 25*s.* a week. For the first twelve weeks after their separation he paid the sum agreed upon, and then stopped payment almost entirely. The parties did not meet to converse, and the only further payments which were made by the husband to the wife appear to have been some small fragmentary sums, not exceeding 2*l.* or 3*l.* in all, which the husband contributed at rare intervals. From the end of the year 1934 onwards he has made no contribution at all to his wife's support.

Immediately before the petitioner left her husband he asked her to forgive him and to make a fresh start, but as he did not propose, after nearly four years of marriage, to make a separate home of his own for her, the petitioner refused to forgive him. Twice in the year 1933 the respondent wrote to his wife. The first letter, which was in the month of January, is of an indeterminate character asking his wife to be friends and stating that he hopes to be able to help her shortly. The second, which is dated July 17, 1933, asks her in terms to come back to him if he is able to obtain a job. This letter contains (inter alia) the following expressions: "I know how "deeply I have hurt you but if you will forgive me I will never "give you one moment's cause for regret"; and again: "I drove you off because I knew the crash was coming and "I was so desperate then that I did anything, not caring "what happened." To these letters the petitioner made no reply, and no further letters passed between the spouses. On July 5, 1937, the parties met again by appointment to discuss the future. The petitioner discovered that her husband was in active practice as an accountant, though he appeared to have very little money, but again he made no offer of a separate home and the meeting led to no result.

In the meantime the petitioner had met a man with whom she had committed misconduct upon a few isolated occasions, and whom she is now anxious to marry. She made no mention to her husband at their meeting in July, 1937, of the fact of having committed misconduct and there seems to be no reason to suppose that her husband, who took so little interest in her movements, ever suspected, much less knew of, her adultery.

H. B. D. Grazebrook, for the petitioner.

1939. March 27. LANGTON J. [after stating the facts as above continued :] Upon these facts, as proved before me by the petitioner, it is obvious that two obstacles stand in her path against obtaining a decree. There is in the first place the undeniable fact of the separation deed in May, 1932, and, secondly, there is the question of her own adultery. To my mind by far the most important of these two obstacles is the first, but with regard to both of them I have been greatly assisted by what I believe to be the complete truthfulness of the petitioner. Notwithstanding the fact that it must have become apparent to her whilst in the witness-box that I was experiencing grave difficulty with her case, she did not at any time give me the impression either of exaggerating anything against her husband, or of minimizing anything against herself in order to advance her own interests. Her discretion statement, which was put before me in evidence, is to my mind a candid document, and she did not depart from it in her oral evidence in any particular.

In the circumstances I have naturally, and I imagine rightly, approached this case with every inclination to assist the petitioner, who has upon any view of the facts been treated most unhandsomely by her husband.

The only case that was cited to me in argument by Mr. Grazebrook was a decision of my own, *Ratcliffe* v. *Ratcliffe*. (1) I will consider the bearing of that case upon the present one

(1) [1938] W. N. 203.

in due course, but for reasons which will presently appear it affords me no assistance in determining the present issue.

I have considered this issue from two aspects: first, whether I can look at the circumstances attending upon the first break-up or division in the matrimonial home, that is to say whether I can go behind the deed and say that the initial division of the parties was brought about by the desertion of the husband; and, secondly, whether, if I am debarred from doing this, I could hold that, notwithstanding the existence of the deed, there has been such a repudiation of the deed upon both sides and such circumstances existing for a period of three years immediately preceding the commencement of these proceedings, that the husband could be held to be guilty of desertion.

In order to inform myself properly upon these two aspects, I have had recourse to a number of the better known authorities upon this subject of desertion. The first of such authorities which seems to me to have a direct bearing upon the matter in question is *Crabb* v. *Crabb* (1). This case raised exactly the point whether a wife could petition for a dissolution of her marriage on the ground of desertion and adultery in the face of a deed of separation between the parties. No one to-day suggests that desertion has acquired any new meaning by reason of the fact that it is now a sufficient ground for divorce without the concomitant of adultery. In *Crabb* v. *Crabb* (2) the judge ordinary deals with the matter as follows: "The "broad question raised here is, whether a woman who has "quitted her husband's house under a bargain to do so, made by "a deed of separation, can be said to have been 'deserted "'without cause' by him. The proposition hardly bears "stating, unless, indeed, all 'separations,' voluntary or "involuntary, be 'desertion'—the consent of complaining "parties unimportant and the person deserted, not he who "was left in the common home, but she who quitted it . . . . "Lastly, it was said that the husband did not fulfil his part "of the bargain, and only paid the £100 a year according to "his covenant for one half-year. This, if a condition precedent

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(1) (1868) L. R. 1 P. & M. 601.

(2) Ibid. 603.

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"to the covenant of the wife's trustee that she should not "attempt to enforce cohabitation in this Court, might, in "another Court, be held to relieve him from that covenant. "In a word, if the husband's side of the bargain was not "adhered to, the wife might have been remitted to her original "status and set free from the prohibitions contained in the "deed against enforcing those rights which in this Court have "never ceased to exist and lie open to her assertion. But the "husband's breach of his contract could not by relation back "make the actual parting involuntary, which was in fact "voluntary, though the volition of the wife was moved by the "husband's promises. The separation, it must always be "remembered, was an act done under the deed, and though the "deed is void, or its covenants afterwards broken, it would be "most unjust to treat that act as if the deed had never existed. "The failure of the deed cannot be held so to react upon the "separation for which it provided, as to impress upon that "separation a character entirely opposite to that which it "bore at the time. If it could, it might as well be said that "the wife had deserted her husband as that he had deserted "her. But all this presumes the absence of fraud, for if a "man, determining to abandon his wife, were to set about "fraudulently, by the show of an agreement which he intended "never to fulfil, to induce or extort her consent to their mutual "separation, covering his true purpose under delusive covenants, and seeking a shield for his design in a consent "bought by treachery, the Court might well be asked to "reject the false face of the transaction, and regard the real "object that lay underneath."

It is important to note that in spite of his strong expressions concerning the impossibility of ignoring the existence of the deed, or of putting it on one side merely because its covenants were broken, the judge does not exclude the possibility of a fraudulent or completely unreal deed behind which the Court would not hesitate to go.

In the same volume some nine months later there is reported the case of *Fitzgerald* v. *Fitzgerald* (1). The judge ordinary uses this language: "I come, then, to the following conclusions as applicable to cases of this kind. No one can 'desert' "who does not actively and wilfully bring to an end an existing "state of cohabitation. Cohabitation may be put an end to "by other acts besides that of actually quitting the common "home. Advantage may be taken of temporary absence or "separation to hold aloof from a renewal of intercourse. "This done wilfully, against the wish of the other party, and "in execution of a design to cease cohabitation, would constitute 'desertion.' But if the state of cohabitation has "already ceased to exist, whether by the adverse act of "husband or wife, or even by the mutual consent of both, "'desertion' in my judgment, becomes from that moment "impossible to either, at least until their common life and "home have been resumed. In the meantime either party "may have the right to call upon the other to resume their "conjugal relations, and, if refused, to enforce their resumption, "but such refusal cannot constitute the offence intended by "the statute under the name of 'desertion without cause.'"

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(1) (1869) L. R. 1 P. & M. 694, 698.

This decision of the judge ordinary in *Fitzgerald* v. *Fitzgerald* (1) was cited before the Divisional Court consisting of Stephen and A. L. Smith JJ. in 1887 in *Pape* v. *Pape* (2), where a question arose as to whether a failure and refusal to carry out the terms of a deed of separation could be held to constitute desertion under the Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 Vict. c. 52), s. 1. Stephen J., in giving the judgment of the Court, says (3): "It is not necessary to give a definition of desertion. Desertion "at any rate implies that the parties are living together at "the time when the desertion takes place. Here they were "living apart under an agreement to separate. The complaint "of the respondent is really that the appellant has left off "paying the money which was the consideration for the "separation. The statute facilitates provision for women "who have been deserted by their husbands. The respondent "has not been deserted by her husband, and has no remedy

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(1) L. R. 1 P. & M. 694.
(2) (1887) 20 Q. B. D. 76.
(3) 20 Q. B. D. 79.

"under the statute. Whatever rights the parties had, apart "from the statute, when the application under the statute "was made, they have still."

As to these last two cases, though I would not venture in any way to criticize the validity of the decisions arrived at, I can only say that for my part I find some of the expressions employed rather too wide, or at least capable of misconstruction. I would readily agree that in the overwhelming majority of cases desertion in fact takes place between parties who are enjoying an existing state of cohabitation, but it does not appear to me to be beyond the bounds of quite ordinary imagination to conceive a case where the behaviour of a spouse separated under agreement could amount to desertion. If A, a husband living apart from B his wife, whether under a deed of separation or under a verbal agreement between the parties, were to announce to his wife that he intended to abandon residence in England, and to break every covenant in the deed, or every term of the agreement, thus leaving his wife completely penniless, and the wife accepting this as a repudiation of the deed, were to proceed by way of summons before a magistrate, I cannot doubt that a magistrate would find desertion against the husband. Moreover, if the husband, having carried out his expressed intention, were to return to this country three years later, I imagine that this Court would not be in difficulty as to granting a decree on the ground of desertion.

Furthermore as regards *Fitzgerald* v. *Fitzgerald* (1) it is instructive to note, as was recently pointed out by the President in *Jordan* v. *Jordan* (2), that in 1873 Sir James Hannen granted the same lady, to whom Lord Penzance had twice refused a divorce, a decree nisi upon the grounds of adultery and desertion. The most detailed report of the facts proved in this final and successful suit of Mrs. Fitzgerald appears in the report of the case in the Law Journal reports (3). It is fairly clear from this report that Sir James Hannen acted upon a further refusal (either tacit or express) on the part of the

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(1) L. R. 1 P. & M. 694.

(2) Ante, p. 239.

(3) (1874) 43 L. J. (P. & M.) 13.

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husband to resume cohabitation with his wife, and it is entirely clear that there had been no resumption of cohabitation such as had been laid down by Lord Penzance as an indispensable prelude to desertion. It seems fair, therefore, to claim that Sir James Hannen, himself no mean authority on these matters, did not subscribe to the full doctrine enunciated by Lord Penzance.

All the cases which I have so far cited, and others, came up for review before the Court of Appeal in 1891 in the case of *Reg.* v. *Leresche* (1). This case was also raised under the Married Women Act, 1886. Lopes L.J. in giving the decision of the Court, expressly approved the decision in *Pape* v. *Pape* (2), and also approved and made a fairly lengthy citation from the case of *Fitzgerald* v. *Fitzgerald* (3). In applying the latter case to the case under his consideration, he said (4): "As was said in "*Fitzgerald* v. *Fitzgerald* (3), desertion implies an active "withdrawal from a cohabitation that exists. This brings "me to the case now before the Court. The husband and "wife at the date of the alleged desertion were living apart "under a separation deed. Cohabitation had ceased by "mutual consent. It was, therefore, impossible that the "husband could desert the wife. So far this case is governed "by *Pape* v. *Pape* (2), with which decision I entirely agree."

There can, of course, be no doubt that the Court of Appeal have adopted to the full the language of Lord Penzance in *Fitzgerald* v. *Fitzgerald* (3), and equally, of course, I recognize at once that I am bound by the decision of the Court of Appeal. The facts, however, in *Reg.* v. *Leresche* (1) were that a wife claimed maintenance against her husband before magistrates on the ground of his desertion because the husband had failed to pay under a deed, and later under a judgment founded upon the deed, and the wife having thereafter asked him to resume cohabitation the husband had refused. Again, I would, with great respect, entirely agree with the decision of the Court that these facts do not constitute a case of desertion; but I would humbly have thought that this was clear, not

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(1) [1891] 2 Q. B. 418.
(2) 20 Q. B. D. 76.
(3) L. R. 1 P. & M. 694.
(4) [1891] 2 Q. B. 421.

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because "the parties must be living together as man and wife "when the desertion takes place," but because a parting admittedly brought about by agreement cannot be altered to a state of desertion either by the breach of a covenant in the deed of separation, or by a refusal of a request to resume cohabitation, or by a combination of these two together. Furthermore, another and even more simple ground upon which this decision could have been rested was that the facts, instead of showing that the wife had accepted the husband's repudiation of the deed, showed the exact opposite, since she had sued upon the deed. In such circumstances the Court might well have treated the request to resume cohabitation as a manœuvre whereby to force the husband into the position of being a deserter when the wife on her side had no sincere intention of returning. Again, therefore, I would with the deepest respect suggest that the expressions here used and adopted from *Fitzgerald* v. *Fitzgerald* (1) go beyond what was necessary for the decision of the case in hand, and are too wide to be entirely accurate in every case.

Since the passing of the Matrimonial Causes Act, 1937, I find that my brother Hodson has dealt with a somewhat similar point to that now raised before me in the case of *Watson* v. *Watson* (2). In that case, the husband having deserted his wife in the year 1924, the parties entered into a deed of separation in the year 1929. The deed of separation contained a recital of an admission in terms that the husband had deserted his wife. In spite of express provisions as to payment by the husband to the wife, no substantial sum was ever paid, and indeed the husband's total contribution under the deed amounted to 4*l.* 10*s.* The learned judge found as follows: "In this case the parties did not separate under a deed at all, "but because the husband deserted the wife. The execution "of the separation agreement was a mere incident in that "desertion. It was not followed by the respondent's observing "the terms of the agreement, nor was it in any way sought to "be enforced by the petitioner."

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(1) L. R. 1 P. & M. 694.

(2) [1938] P. 258.

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In the case which came before me of *Ratcliffe* v. *Ratcliffe* (1) to which I have referred, the facts as I remember them were, in some respects, similar to those in the case of *Watson* v. *Watson.* (2) I was satisfied upon the evidence that the deed of separation was not entered into in good faith by the respondent, and could therefore and ought to be treated as a similar deed was treated in *Watson* v. *Watson* (2)—namely, as a mere incident in what was really a case of desertion.

From a consideration of all these cases it appears to me to result that two principles emerge ; first, that, where a deed of separation has been entered into in a bona fide spirit between the parties, the Court cannot go behind the deed to inquire into the facts which brought about the real division between the spouses ; and, secondly, that, where spouses are living apart under a deed of separation, the relationship begun by consent cannot be changed into desertion by a mere refusal of one party to resume cohabitation or by a breach of the covenants of the deed. Such a metamorphosis could only, as I understand it, be effected by a complete repudiation by one party, which had been accepted as such by the other, in such circumstances that the proper inference to be drawn from all the facts of the case is that the spouse by whom the repudiation is being accepted is willing to return to cohabitation, and is both in a position to insist on his or her conjugal rights and is in fact reasserting them.

If, for example, in the imaginary case of A and B, which I have set out above, the wife B, at the moment of receiving her husband's repudiation of the deed and notification of intended departure, were in fact living in adultery, the Court before which such facts were presented might have a different duty as to pronouncing the husband to be a deserter.

I may note in passing that in *Ratcliffe* v. *Ratcliffe* (1) I was careful to lay down that I would not accept the proposition that the mere fact that a husband had not kept up payment under the deed was sufficient in all circumstances to justify a plea that the deed was therefore repudiated.

In the course of my examination of the authorities in the present case I find that Horridge J. in the year 1915 in *Smith* v. *Smith* (1) made the following observation in almost identical language to my own: "It must not be taken, where parties "separate under a deed, that I should hold there has been "desertion merely because the husband has failed to pay the "allowance provided by the deed."

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(1) [1938] W. N. 203.

(2) [1938] P. 258.

Applying the principles which I have thus extracted to the present case, I do not feel that I have any material upon which I could possibly find that the deed in the present case was not a bona fide agreement. It is true that, as in *Watson* v. *Watson* (2) and in *Ratcliffe* v. *Ratcliffe* (3), the payments made under the deed were small in amount and of short duration. It is equally true that for more than three years before the commencement of proceedings both parties had apparently ignored the deed and neither had made any reference to their rights or obligations thereunder. Against all this, however, must be set the circumstances, first, that the highest at which the original action of the husband could be put against him is that it was a constructive desertion through continuous neglect. Further, even if it were permissible to look behind the deed, which as I have said I am satisfied cannot be done, I have doubt as to whether in all the circumstances this constructive desertion is proved. On top of this difficulty comes also the husband's request to be forgiven at the moment of parting and his subsequent letters. I can accept, I think, that his wife did not believe the letters to be genuine, but by the time she received them she was contented and settled in steady employment, and until she met him in 1937 she does not appear to have given him any opportunity of demonstrating the worth or otherwise of his professions. Finally there is the small difficulty raised by the meeting in 1937, which, although it led to no results, appears to have been entered upon in a spirit of neutrality, if not of actual amity, in order to discuss the future.

No one I think could blame the petitioner for the fact that after such a course of treatment from her husband her affections should by that time have become engaged elsewhere, but I cannot shut my eyes to the fact that it is additionally difficult to consider her husband as guilty of desertion, when she, who commenced her separation under the terms of the deed and ignored the overtures contained in her husband's letters, does not profess at any time, or even at the meeting held for the purpose of a full and frank discussion concerning their future plans, to have made any suggestion that their married life should be resumed. I feel therefore that, however reluctantly, I must in this case hold that the deed of separation bars the plea of desertion.

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(1) [1915] P. 288, 289.
(2) [1938] P. 258.
(3) [1938] W. N. 203.

In case this matter should be taken further, it is perhaps right for me to say that, so far as the exercise of my discretion was concerned, I did not feel any serious difficulty. The frankness of the petitioner concerning her own conduct, and the temptation to which, upon any view of the circumstances, her husband's conduct had exposed her, were in my view sufficient reasons to justify me in granting her the discretion prayed. Neither did the question of how far the respondent's conduct might or might not have been affected by the petitioner's adultery cause me any real anxiety. Upon this side of the question I am content to follow the judgment of the President in *Herod* v. *Herod* (1), where the President uses the following language: ". . . . . It seems to me to be "impossible to hold that adultery of which the deserter is "proved to be entirely ignorant, or to which, if it is known, "he or she is proved to be entirely indifferent, can have "affected his or her own intention in the matter. . . . ."

Upon the facts of this case as I have found them I am equally satisfied, first, that the respondent was ignorant of his wife's adultery during the three years immediately preceding the presentation of this petition, and, secondly, that such adultery if known to him would have left him entirely indifferent.

Langton J. dismissed the petition, the respondent being ordered to pay the costs.

The petitioner appealed. The appeal was heard on July 21, 28, 1939.

(1) Ante, pp. 11, 23.

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D. P. Maxwell Fyfe K.C., *H. B. Durley Grazebrook K.C.*, and *W. R. K. Merrylees* for appellant. A deed of separation is not conclusive as to whether the parties separated under or by reason of it. There are authorities for the proposition that, even where a deed is entered into bona fide, the Court will go behind the deed and look at antecedent matters, and, if it thinks fit, say that the separation was not under or by reason of the deed. The Court can treat the separation as being outside the deed. Where there are acts constituting constructive desertion, the husband cannot answer by putting up the deed which he has repudiated by his acts. Here the husband by not paying the wife the 25*s*. a week provided for by deed repudiated the deed, and it is evident from what took place at the interview on July 5, 1937, that the wife accepted that repudiation. In each of the cases referred to by Langton J. there was a special finding that the separation took place under a deed of separation. They are not material to this case. *Fitzgerald* v. *Fitzgerald* (1) was a very special case and does not apply here. *Pape* v. *Pape* (2) and *Reg.* v. *Leresche* (3) were under a different Act. In *Moore* v. *Moore* (4) the wife was granted a decree of judicial separation, notwithstanding a deed of separation.

[SIR WILFRID GREENE M.R. In that case there was desertion by the husband for two years before the deed was entered into.]

In *Hussey* v. *Hussey* (5) and *Smith* v. *Smith* (6), where the husbands failed to continue the payments provided by the deed, the wives were held to be entitled to a decree, notwithstanding a deed of separation. In *Tate* v. *Tate* (7), where there was a deed of separation, the wife was granted a decree on the ground of separation alone. In *Sifton* v. *Sifton* (8) it was held that there is a presumption in favour of the deserted spouse. In *Stockley* v. *Stockley* (9) there was repudiation and acquiescence. *Starkey* v. *Starkey* (1) and *Ratcliffe* v. *Ratcliffe* (2) are other cases in which decrees for desertion were granted, notwithstanding deeds of separation.

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(1) (1869) L. R. 1 P. & M. 694; (1874) L. R. 3 P. & M. 136.

(2) 20 Q. B. D. 76.

(3) [1891] 2 Q. B. 418.

(4) (1887) 12 P. D. 193.

(5) (1913) 109 L. T. 192.

(6) [1915] P. 288.

(7) [1938] 4 All E. R. 264.

(8) [1939] P. 221.

(9) [1939] 2 All E. R. 707.

Adultery by a deserted spouse is not a bar to the deserted spouse obtaining a divorce: *Herod* v. *Herod.* (3)

On the authority of those cases and on the facts in this case, the appellant is entitled to the decree she asks for.

SIR WILFRID GREENE M.R. In this case the appellant sought dissolution of her marriage on the ground of desertion by her husband without cause since November 5, 1934. After less than four years of unhappy married life the spouses, on May 30, 1932, executed a separation deed under which the respondent agreed to pay to the appellant the sum of 1*l.* 5*s.* a week for her maintenance so long as she should lead a chaste life. Payments were made under this deed until a date in September, 1932, and the respondent then stopped payment. Some two years later he paid to the appellant 10*s.* in September, 1934, and on November 5, 1934, he paid her 2*l.*, after which he made no further payments. These payments were not what the deed provided for.

In July, 1935, and thereafter on several occasions the appellant committed adultery, and the liability of the respondent to make payments under the deed would accordingly have ceased. Langton J. would have felt no difficulty in exercising his discretion in her favour if he had thought that she was otherwise entitled to a decree, and I agree with the view which he took upon this matter. He held, however, that the continued separation of the spouses must be referred to the separation deed and not to desertion by the respondent, and he accordingly refused to make a decree.

The argument for the appellant fell under two heads: First, it was said that in view of the respondent's treatment of the appellant before the execution of the separation deed she would have been justified in leaving him; that had she done so the case would have been one of constructive desertion;

(1) (1938) 54 Times L. R. 1117.
(2) [1938] W. N. 203.
(3) Ante, p. 11.

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and that notwithstanding the execution of the deed the disruption of the matrimonial home must be attributed to an act of desertion by the husband. I am unable to accept this argument. The conduct of the respondent was, I think, such that, if the appellant had left him, there would have been constructive desertion. But she did not leave him until the execution of the separation deed and it is impossible to say that the separation was other than consensual.

The second argument was that, even though the separation was originally consensual and not due to an act of desertion on the part of the respondent, it subsequently changed its quality and became desertion. The date given in the petition as the beginning of desertion was November 5, 1934, when the last payment of money by the respondent was made. But it would be sufficient for the purposes of the appellant's case if desertion began at any time before May 19, 1935.

The first question which arises is whether or not it is possible in law for a separation which began by being consensual to acquire the character of desertion without a previous resumption of cohabitation. Looking at this question on principle and apart from authority, I can see no reason why the answer to it should not be in the affirmative. The word "desertion" may describe an act or it may describe a state. For the act of desertion both the factum of separation and the animus deserendi are required. A de facto separation may take place without there being an animus deserendi, but, if that animus supervenes, desertion will begin from that moment, unless, of course, there is consent by the other spouse. Thus a husband who leaves his wife for a business voyage may, nevertheless, become guilty of desertion without the necessity of a previous return. All that is required to establish desertion in such a case is the presence of a supervening animus deserendi (a matter to be inferred from the words and conduct of the deserting spouse), a continuance of the de facto separation, and the absence of consent by the other spouse. I do not see why, in a case where the original separation was due to the agreement of both spouses to live apart, it should be impossible in law for a similar change in the quality of the separation to take place without there being any previous resumption of the common life. In such a case the burden of proving that the change has taken place may not be easy to discharge; but this is no reason for saying that the Court must refuse to admit the possibility. It appears to me that the first question which the Court ought to put to itself is: "Was the separation which de facto existed during the "relevant period attributable to the agreement under which "the parties separated or was it due to a supervening animus "deserendi on the part of the respondent?" The existence of such an animus is a matter of inference from the facts of the case. If, for example, a husband who has left his wife under the terms of a separation deed subsequently repudiates the deed, but continues to live apart from his wife, it would be easy to infer that his intention to live apart which was originally based on the consent of both parties had become an intention to desert. But it is on the side of the spouse alleging desertion that the practical difficulty arises in such a case, since, in order that a separation which began by being consensual may be changed into desertion, it must lose its consensual element on both sides. Thus if the spouse alleging desertion has during the relevant period affirmed the continuing validity of a separation deed, for example, by suing for maintenance under it, there cannot be desertion, since the necessary lack of consent on his or her part cannot be shown. If, on the other hand, one spouse has repudiated the deed and the other can show that during the relevant period he or she has not had any intention of relying on the separation deed and was always ready and willing in spite of it to resume cohabitation, it appears to me that it would be completely unreal to say that he or she still consents to the separation. In such a case the separation is no longer due to the consensus of the parties. The one is willing to resume cohabitation, the other is not; the original consent to the separation was given on the footing that the separation deed would regulate the relations of the parties; is one spouse to be held to that consent against his or her will when the other spouse by repudiating the agreement has destroyed the whole basis upon which the separation took place? I do not find myself forced to any such conclusion, since, in the case assumed, the separation deed has ceased to have any influence upon the mind or the conduct of either party and has for all relevant purposes become a dead letter.

I here quote a passage from the judgment of Langton J. which sums up his conclusions upon these matters. He says: "Where spouses are living apart under a deed of separation, "the relationship begun by consent cannot be changed into "desertion by a mere refusal of one party to resume cohabitation or by a breach of the covenants of the deed. Such a "metamorphosis could only, as I understand it, be effected "by a complete repudiation by one party, which had been "accepted as such by the other, in such circumstances that "the proper inference to be drawn from all the facts of the "case is that the spouse by whom the repudiation is being "accepted is willing to return to cohabitation, and is both "in a position to insist on his or her conjugal rights and is in "fact reasserting them." I am prepared to accept this as an accurate statement of the law subject to certain qualifications. I agree that there must be a complete repudiation of the deed by one party if the word "complete" means no more than that the repudiation must be of the whole deed. The question whether or not the conduct of the party concerned ought to be treated as a repudiation falls to be answered in accordance with ordinary principles. Breach of a particular covenant by itself may not amount to repudiation; on the other hand, the breach may be so fundamental or so persistent or may have such a significance when regarded in the light of all the circumstances of the case as to justify the inference that repudiation is intended. This is the case with commercial contracts, and I see no reason for thinking that any different principle is applicable in relation to a separation deed. Passing to the attitude of the spouse alleging desertion, the learned judge says that the repudiation must have been accepted as such. It is true that an ordinary contract is not discharged by unilateral repudiation; the other party must "accept" the repudiation in the sense that by words or

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conduct he must bring it to the mind of the repudiating party that he elects to treat the repudiation as discharging the contract. But I do not think that this principle can be applied to the case of alleged desertion following upon a separation deed. It is true that, if the party alleging desertion affirms the continued existence of the deed, for example, by suing under it or otherwise showing an intention to treat it as still on foot, he or she is necessarily consenting to the continuance of the separation. The significance of such a step is that it is evidence of continuing consent. But in my opinion the only thing required on the part of the spouse alleging desertion is that he or she should not be a consenting party to the continuance of the separation. Whether or not he or she does remain a consenting party must be a question of fact, and no doubt " acceptance " of the repudiation and, to take another phrase used by Langton J., " reassertion of conjugal rights " would be the strongest evidence of the absence of consent. But I cannot agree that without them the fact that consent has come to an end is in law incapable of proof. In considering whether or not the mental elements necessary to constitute a case of desertion are present in the case of both parties, the whole of their conduct and their words may be taken into account, and I am not prepared to accept the proposition that certain acts and certain words are a sine qua non. In the case of an ordinary contract acceptance of repudiation is necessary for what may be called commercial reasons, since the party repudiating must be in a position to know whether or not the other party is holding him to the contract. But in the cases with which we are concerned the spouse who repudiates the separation deed does so in such circumstances as to show not that he repudiates the deed in the sense that he regards himself as free to resume the cohabitation which the deed prohibits, but that he does not propose to resume cohabitation, that is, that he intends to desert, which is something more than mere repudiation. A person who repudiates a commercial contract indicates thereby that he does not propose to do the thing which he has agreed to do, or that he considers himself free to do that which he has

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agreed not to do. But in the case of the repudiation of a separation deed coupled with the animus deserendi, the repudiating party is showing that he proposes to do the very thing which under the deed he agreed to do, namely, live apart, but to do it of his own free will and not under the compulsion of his covenant. The conduct of the other spouse therefore cannot affect his conduct in any way so far as regards his intention to desert—it is only important as affecting the question of the intention of the other spouse, which is a different matter altogether.

I do not find anything in the authorities which were cited to us which in any way conflicts with what I have said, except some much discussed passages in the judgment of Lord Penzance in *Fitzgerald* v. *Fitzgerald* (1): "Desertion means "abandonment, and implies an active withdrawal from a "cohabitation which exists"; and again (2): "No one can "'desert' who does not actively and wilfully bring to an end "an existing state of cohabitation. . . . But if the state of "cohabitation has already ceased to exist, whether by the "adverse act of husband or wife, or even by the mutual "consent of both, 'desertion,' in my judgment, becomes "from that moment impossible to either, at least until their "common life and home have been resumed." These words of Lord Penzance have been critically examined more than once. In his judgment in the present case Langton J. refers to these criticisms and adds some penetrating observations of his own with which I find myself in agreement. I also agree with his comments upon the decision of this Court in *Reg.* v. *Leresche* (3), in which the observations of Lord Penzance were referred to with approval. As already appears, my real criticism of the judgment of Langton J. is that it does not go far enough.

I may summarize my opinion by saying: (1.) that where the original separation was by mutual consent, desertion may supervene without the necessity of a resumption of cohabitation; (2.) that this can happen where (*a*) on the part of the spouse alleged to be in desertion there is repudiation of the agreement under which separation took place, no step taken towards the resumption of cohabitation in fact, and, in addition to repudiation, the animus deserendi, and (*b*) on the part of the spouse alleging desertion there is not only no insistence on the terms of the separation agreement, but a bona fide willingness to resume cohabitation without regard to its terms—in short, if it can be said that both parties are during the relevant period in truth regarding the agreement as a dead letter, which no longer regulates their matrimonial relations; (3.) that whether or not these conditions exist during the relevant period is a question of fact in each case, the answer to which depends upon the true inference to be drawn from the words and conduct of the parties; (4.) that, once these conditions are fulfilled, all the elements necessary to constitute a state of desertion are present, namely, de facto separation, animus deserendi, and absence of consent on the part of the spouse alleging desertion.

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(1) L. R. 1 P. & M. 694, 697.
(2) Ibid. 698.
(3) [1891] 2 Q. B. 418.

The question then remains whether or not these conditions are fulfilled in the present case. Two subsidiary matters may be mentioned. The first is that in 1933 two letters were written by the respondent to the appellant asking her to return if he could find a job. To these letters she made no reply. This incident took place some two years before the commencement of the three-year period and in any event I do not regard it as having any real bearing on the question what was the state of affairs during the three years. But in all the circumstances of the case I think that the appellant was entitled to regard these requests as not made in good faith. The other matter is that the appellant herself was guilty of adultery, a fact unknown to the respondent. On this matter I agree with the learned judge that, if he had known the true facts, the respondent would not have behaved differently.

The important facts which bear upon the main question are as follows: The husband's treatment of his wife during the period of cohabitation was calculated to drive her from the house and, as I have already said, would have led to

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Sir Wilfrid Greene M.R.

constructive desertion if it had not been for the separation deed. The wife from the first regarded the separation deed as merely a temporary matter designed, so far as she was concerned, to "bring him to his senses," and she made it clear at the time that if her husband would make a home for her she would join him notwithstanding the deed. The husband's payments under the deed were continued for only a short period and then stopped. After an interval of two years two further payments were made which were not the amounts stipulated for in the deed and should, I think, be regarded as casual and not as covenanted payments. Thereafter no payments were made nor did the wife ask for any. On July 5, 1937, an incident took place which throws light upon the attitude of the parties in relation to the separation deed during the relevant period. The appellant had learnt that the respondent was again in practice and thought that it might not be then too late for reconciliation. With this end in view she made an appointment with him and made it clear to him that she wanted him to provide a home for her, but he made no offer whatever.

In my opinion it is permissible on these facts to infer, and I do infer, that the parties during the relevant period were both regarding the separation deed as a dead letter and that the continuance of the separation was not in any way attributable to its existence.

In the result the appeal is allowed and there will be a decree nisi.

MACKINNON L.J. I agree and have nothing to add.

SIR WILFRID GREENE M.R. I have the authority of Finlay L.J. to say he has read the judgment which I have just delivered and agrees with it.

Appeal allowed.

Solicitors: *Robbins, Olivey & Lake.*

P. J. B.

GREEN *v.* GREEN.

1939
May 19.

Divorce—Incurable unsoundness of mind—Wife's petition for divorce—Husband's absences on trial during the five years preceding the petition—Under care of voluntary association as agent for mental hospital—No interruption in prescribed period of detention—Supreme Court of Judicature (Consolidation) Act (15 & 16 *Geo.* 5, *c.* 49)—*Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *ss.* 2, 3—*Lunacy Act,* 1890 (53 & 54 *Vict. c.* 5), *s.* 55, *sub-s.* 1; *s.* 275, *sub-s.* 5.

On a wife's petition for divorce on the ground that her husband was incurably of unsound mind and had been continuously under care and treatment for upwards of five years immediately preceding the petition, it was held that sundry weekend absences and an absence of a fortnight in the care of a voluntary association, as agent for the mental home authority, within such five years was no interruption in the detention required under s. 3 of the Matrimonial Causes Act, 1937.

WIFE'S PETITION for divorce.

The parties were married in September, 1893, the husband then being twenty-seven and the wife twenty-eight years of age. In November, 1907, the respondent was certified as of unsound mind and detained at the London County Mental Hospital at Banstead, Surrey, as a case of secondary dementia.

In August, 1938, the wife, suing under the Poor Persons Rules, prayed for the dissolution of her marriage on the ground that her husband was incurably of unsound mind and had been under continuous care and treatment since November, 1907. Through his guardian ad litem, the Official Solicitor, the respondent by his answers denied the allegation.

It was proved that the respondent had been allowed absences from the mental hospital during a number of weekends in accordance with certain provisions of the Lunacy Act, 1890, and, in particular, during a fortnight in 1938, in the care of the Mental After-Care Association. With these exceptions, he had been under restraint at the mental hospital since 1907. The case was adjourned for the consideration of the question whether or not such absences should be regarded as an interruption in the detention laid down by the statute. (1)

Alan Goss for the petitioner.
Theodore Turner for the respondent.

1939. May 19. THE PRESIDENT (SIR BOYD MERRIMAN.) This is a petition by a wife for dissolution of marriage on the ground that her husband is incurably of unsound mind, and has been under the care and treatment required by the Matrimonial Causes Act, 1937, for at least five years preceding the presentation of the petition. I am satisfied beyond any doubt whatever that the husband is incurably of unsound mind. The wife was compelled to ask for the exercise of the discretion of the Court in circumstances which I need not go into, but which have resulted in the fact that she had no married life at all for the last thirty years, her husband having been confined under a reception order, since November, 1907, and I have no hesitation in saying that it is a proper case in which she should be granted relief notwithstanding her own adultery.

Through Mr. Turner, on behalf of the guardian ad litem, the Official Solicitor very rightly and properly called my attention to the fact that in this case there had been from time to time, and in particular during the last five years, certain periods of absence from the Banstead Hospital, where the husband is at present confined, which come under two heads. There have been occasional absences on parole for weekend periods, not very frequent: that is authorized under the rules made under s. 275, sub-s. 5, of the Lunacy Act, 1890, whereby regulations may provide for the absence for a period not exceeding four days of a patient from the asylum by permission of the management without any formality.

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(1) 1 Edw. 8 & 1 Geo. 6, c. 57, s. 3: "For the purpose of section "one hundred and seventy-six of "the principal Act, as amended by "this Act, a person of unsound "mind shall be deemed to be under "care and treatment—(*a*) while he "is detained in pursuance of any "order or inquisition under the "Lunacy and Mental Treatment "Acts, 1890 to 1930, ... "

I do not think that it is necessary to refer more particularly to the weekend absences; I dealt with infrequent absences of that character in *Shipman* v. *Shipman* (1) and I indicated then that, unless they were frequent, it might not be necessary to regard them as interrupting the detention. But obviously these absences for a fortnight at a time and in particular the fortnight last year within the period of five years raise more difficult questions; and as it was presented to me at the original hearing, it was made to appear that this absence was of a holiday character with little, if any, element of restraint or detention on the part of the London County Council. I therefore adjourned the case in order that I might be informed as to the nature of the arrangements made for these absences, and the particular statutory authority under which the arrangements were made.

I have now had the advantage of hearing the evidence of Mr. Curtiss, the Chief Officer of the London County Council responsible for the administration of these matters. As the result of hearing his evidence, the facts appear to be as follows: This particular patient was sent to Whitstable for a fortnight from May 31 to June 14 last year on trial under the provisions of s. 55, sub-s. 1, of the Lunacy Act, 1890. He was sent to a house which belongs to a voluntary association known as the Mental After-Care Association. This house had been inspected and approved by the London County Council for the reception of parties of patients so released on trial and for the exclusive occupation during a time when any London County Council patients were there. There is no question whatever of the house or grounds being used as a holiday camp by people unconnected with mental institutions, nor is there any question of reception in this house, while the London County Council party meet there, of mental patients from any other institution.

I have not seen the actual correspondence between the London County Council and the After-Care Association, and having regard to Mr. Curtiss' evidence, I do not think that it is necessary to adjourn the case in order to have copies of the correspondence put in; but Mr. Curtiss has made it clear to me that, apart from the fact that the particular house to which the party is sent by arrangement is inspected and approved, there is also a financial arrangement by which 23*s.* 4*d.* a week is paid for every patient and 2*s.* 6*d.* for pocket money for the use of the patient.

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(1) [1939] P. 147.

Mr. Curtiss has also made it clear to me that the party is escorted from the Banstead Hospital to this particular house by an appropriate escort from the hospital, that during the stay of the patients at this house they are inspected by inspectors provided by the After-Care Association, and sometimes by the London County Council, or both, that the authorities in charge of the house are in constant communication with the hospital, and that in the event of any lapse from good conduct the matter would instantly be reported to Banstead, and the offending patient would at once be escorted back to Banstead. Mr. Curtiss told me that, though there is intended to be a greater element of liberty and a greater absence of restriction than is possible in Banstead Hospital itself, the party of patients during the time that they are at this house are under careful control and observation of the Mental After-Care Association and its officers as agents of the London County Council.

I do not propose to make, or rather to repeat, the elaborate review of the statutory provisions which I made in *Shipman* v. *Shipman*. (1) It is clear that, so far as the reality of the matter is concerned, this arrangement could have been made under s. 57 of the Lunacy Act, 1890, the arrangement for the boarding-out of lunatics, when the patient is delivered over to the custody of relatives or friends, and in that case there would be no question whatever, in my opinion, of any break in the detention, and any use of the word "custody" would imply that, assuming that there really was custody. But Mr. Curtiss has explained that there are administrative difficulties, one of which appears on the face of the section

(1) [1939] P. 147.

itself, by the fact that the place at which the lunatic is boarded out may be in a different county from the authority which is responsible, and other things of that sort, which have induced them not to use the provisions of that particular section.

Now I must not be taken to be dealing with the much more difficult case of release on trial. Where these elements of restraint to which I have referred are lacking, and where there is no element of agency on the part of the person to whom the patient is sent on trial, each case will have to be dealt with on its own merits. I am dealing simply with the facts of this particular case and other cases in which precisely the same arrangements apply, and I have come to the conclusion that in this case there has been no break in the detention which is required by the statute.

Mr. Curtiss has explained to me that it is right and proper, and I think his explanation entirely satisfies me, that I may regard this particular arrangement as an absence on trial under s. 55, sub-s. 1, of the Act, but it is a very special sort of absence on trial. There is no question here of release preparatory to discharge; still more so there is no question of after-care after discharge. It was for those two purposes that this voluntary association, the Mental After-Care Association, which everybody knows has done so much splendid work in connection with these cases, was originally formed. Here they are acting as agents of the London County Council for rather a different sort of trial, where the element of discharge, or even of potential discharge, does not enter into the matter at all.

Mr. Curtiss explained that these are patients who have been in hospital for a very long time, with regard to whom there is no prospect of discharge at any time, but they have become stabilized, their conduct is good within the limits of the hospital; they are well conducted, amenable to discipline, good workers, and so forth, and they are regarded as fit to be subjected to the test, on trial, of their capacity to conduct themselves in the same way out of the stricter hospital environment. In that sense they are released on trial, though

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they are still subject to discipline and to modified restraint. By arrangement with the London County Council in the manner that I have described the After-Care Association, though the question is not strictly one of after-care at all, have undertaken the conduct of these trials on behalf of the London County Council.

Now that I am satisfied about the particular arrangements applicable to this case, I think that I can properly hold, and Mr. Turner on behalf of the guardian ad litem does not dispute that I can properly hold, that there is no interruption of the detention.

In these circumstances I pronounce a decree nisi in this case.

Solicitors: *Morrish, Strode & Searle; the Official Solicitor.*

W. L.

WILLIAMS *v.* WILLIAMS (BY HIS GUARDIAN).

1939
Feb. 17;
March 9.

Divorce—Wife's petition on ground of alleged desertion—Husband's desertion in 1933—*Husband certified in* 1934—*Still under restraint —Incapable of desertion after certification—Duty of magistrates— Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*), *as amended by Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2.

Where on a wife's petition for divorce on the ground of desertion it was established that since the original desertion and for some three years preceding the petition the husband had been under restraint at a mental home, the Court held that the husband was quite incapable of any such mental or moral activity as would show his intention to continue to desert his wife. Therefore the petition failed.

Magistrates should fix the date of desertion when granting a maintenance order on that ground.

Drew v. *Drew* (1888) 13 P. D. 97 distinguished.

WIFE'S PETITION for divorce on the ground of desertion.

Mrs. Jane Dorothy Williams on October 6, 1924, married Mr. Thomas Herbert Williams at West Derby, Liverpool. On May 23, 1934, the wife obtained a maintenance order on the ground of her husband's desertion and wilful neglect to provide her with reasonable maintenance. He was certified on June 26, 1934, and had been under restraint ever since.

By her petition dated January 21, 1938, the wife prayed for the dissolution of her marriage on the ground that the respondent had continuously deserted her since January, 1931. By an answer filed by the husband's guardian ad litem desertion was denied, and in the alternative it was alleged that it had not continued during the three years preceding the petition.

Leo Gradwell for the petitioner. The essential matter is the original desertion. The respondent had a locus pœnitentiæ for three years before his certification but showed no intention of terminating his desertion. In *Drew* v. *Drew* (1) it was held that an interval of imprisonment running into the statutory period of desertion necessary for a decree did not operate to discontinue the desertion. What Sir James Hannen P. was

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(1) (1888) 13 P. D. 97.

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saying in his judgment was in effect that a deserting spouse cannot complain if circumstances overtake him which prevent him from repentance. There was a similar decision by Sir Francis Jeune P. in *Wynne* v. *Wynne* (1), in which there was a warrant out for the deserting husband. No period was laid down for the matrimonial offence of desertion so far as a remedy under the summary jurisdiction was concerned, and here it was most improbable that the husband would ever have returned to the wife and got rid of his offence. The well known passage in Lord Reading's judgment in *Jones* v. *Newtown and Llanidloes Guardians* (2) as to the relief of a husband from the obligation to maintain his wife continuing only so long as she remained voluntarily absent does not necessarily apply to all circumstances and must be read in the light of the obligation of a husband to support his wife rather than that the guardians should be saddled with that obligation. The President in *Herod* v. *Herod* (3) had quoted with approval the words of Lord Merrivale in *Jackson* v. *Jackson* (4) deprecating the laying down of any exhaustive definition of desertion. In the present case the Court is entitled on the analogy of *Drew* v. *Drew* (5) to grant a decree.

Roland Adams for the respondent. A person who has been for the last three years insane and under restraint cannot be said to have deserted the other spouse. Having regard to the ingredients of desertion indicated by Sir Cresswell Cresswell in *Thompson* v. *Thompson* (6), by Sir James Hannen in *Townsend* v. *Townsend* (7), by Lord Merrivale in *Pulford* v. *Pulford* (8), and by the Divisional Court in *Jones* v. *Newtown and Llanidloes Guardians* (2) there can be no desertion here for the statutory period because the respondent was incapable of any intention to continue desertion. The cases of incarceration as in *Drew* v. *Drew* (5) are distinguishable, because a sane man, though in prison, can still take steps to attempt a future reconciliation. As regards the duration of the respondent's desertion before the maintenance order, it would have been helpful if the magistrates

(1) [1898] P. 18.
(2) [1920] 3 K. B. 381, 384.
(3) Ante, pp. 11, 21.
(4) [1924] P. 19, 23.
(5) 13 P. D. 97.
(6) (1858) 1 Sw. & Tr. 231.
(7) (1873) L. R. 3 P. & M. 129.
(8) [1923] P. 18.

had followed the suggestion of Sir Samuel Evans in *Fengl* v. *Fengl* (1) and *Joseph* v. *Joseph* (2) and fixed the date of the desertion in their finding. I submit that this petition should be dismissed.

Cur. adv. vult.

1939. March 9. LANGTON J. delivered judgment as follows: The facts in this case are clear and uncontroverted, but they raise in direct form a point which so far as I am aware and so far as the industry of counsel has been able to ascertain is quite bare of authority. The material facts are that in May, 1933, the respondent deserted his wife, the petitioner, and that on June 26, 1934, the respondent was certified under the Lunacy Act, 1890, and put under restraint. He has continued in a slightly deteriorating condition and always under restraint until the present day. The point raised for consideration by these facts is whether the respondent can properly be held to have deserted his wife for three years immediately preceding the commencement of the present proceedings on January 21, 1938.

The parties were married on October 6, 1924. There were no children of the marriage and the union was never a happy one. The respondent was a heavy drinker, and at times used to stop out during considerable portions of the night. In the year 1931 the wife ceased to sleep in company with the respondent, and although they remained under the same roof, they had henceforth nothing to do with each other save that the husband took his meals in the house. For some time before the final parting the spouses rarely spoke to one another. In May, 1933, the respondent left his wife completely, and on May 23, she brought proceedings against him before the magistrates at Wallesey. The bench found that the respondent had deserted his wife and had wilfully neglected to provide reasonable maintenance for her. Unfortunately the magistrates do not appear to have found the actual date of desertion, and in view of the importance which such dates might possess under the Matrimonial Causes Act, 1937 (though it happens to be of no

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(1) [1914] P. 274.

(2) [1915] P. 122.

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great importance in the present case), I venture to insist once again upon the importance of this duty of magistrates being scrupulously fulfilled. From the day when the respondent walked out of the house in May, 1933, he never returned to his wife.

These facts established clearly that the parting between the spouses was brought about by desertion on the part of the husband. The Matrimonial Causes Act, 1937, gives the petitioner a sufficient ground of divorce under s. 2 (*b*) if he or she establishes that the respondent "has deserted the petitioner "without cause for a period of at least three years immediately "preceding the presentation of the petition." The petition in the present case having been presented on January 21, 1938, and the respondent having been a lunatic under restraint since June 26, 1934, it is obvious that during the whole of the last three years immediately preceding the presentation of the petition the respondent has never been in any sense a free agent. He has appeared to these proceedings by his guardian ad litem and the point taken upon his behalf is that desertion such as will constitute a matrimonial offence must be wilful, and that no man who is without a mind can be said to form any intention and thus be guilty of a wilful act.

The argument in favour of the petitioner, if I may seek to epitomize it, is that whilst it is rightly held that for the purpose of criminal law no lunatic could possibly form a criminal intent, in a civil matter such as the present where it is proved to the satisfaction of the Court that a spouse both formed the intention and carried out the act of desertion, it is possible, and in the present case just, to infer that the desertion would have continued over the statutory period.

Although it was common ground that no direct authorities could be found, both sides buttressed their arguments with well known decisions from which they claimed that fair inferences could be made in favour of their respective sides. For my part I have derived most assistance from the well known decision of the King's Bench Divisional Court in *Jones* v. *Guardians of Newtown and Llanidloes*. (1) In that case

(1) [1920] 3 K. B. 381.

the question arose under the Poor Law Amendment Act, 1850, whether a wife who had left her husband without justification and had later become a lunatic was chargeable to the guardians or to her husband. The Court, consisting of Lord Reading C.J., Shearman and Sankey JJ., found unhesitatingly that the liability rested upon the husband. For present purposes the two important passages in the judgment are, first, in that of Lord Reading (1): "Here the wife has become "a lunatic and continues to be insane. She is therefore unable "to exercise any judgment. She cannot elect to return "home. . . . ." And, secondly, in that of Shearman J. on the same page: "Her desertion of her husband does not, like "her adultery, determine his obligation, it only suspends it "during the time that she wilfully absents herself. Here, "she might have returned to her husband and called upon "him to maintain her at any time before she became insane. "Upon her becoming insane her freedom of will came to an end, "her absence from her home ceased to be wilful, with the "consequence that her husband's obligation to maintain her "revived." It is to be observed that here both learned judges insist, and in fact base their decision upon the fact, that the wife is a lunatic and is unable to exercise any judgment or indeed to possess any freedom of will.

I turn now to the decision of Sir Cresswell Cresswell in *Thompson* v. *Thompson*. (2) The case was one in which the wife sought a judicial separation on the ground of her husband's desertion. The facts are recited and found by the judge (3), but the material fact upon which the judgment was based was that the original parting, which subsequently extended over a long period of years, had been a parting to which the wife consented in order that the husband might seek employment. Sir Cresswell Cresswell used this language (4): "There is a difficulty in defining 'desertion,' and cases "may arise in which it would be very difficult to say whether "the facts proved would fall within the meaning of the statute. "Without attempting to lay down a precise definition of

(1) [1920] 3 K. B. 385.
(2) 1 Sw. & Tr. 231.
(3) 1 Sw. & Tr. 234.
(4) Ibid. 233.

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"'desertion,' I think it undoubtedly must mean a wilful "absenting himself by the husband; and that such absence "and cessation of cohabitation must be in spite of the wish of "the wife; she must not be a consenting party." Here if any authority be needed is abundant and unchallenged authority that desertion in order to constitute a matrimonial offence must be wilful.

Again in the case of *Townsend* v. *Townsend* (1) Sir James Hannen says: "It is essential to the constitution of "desertion that there should be a voluntary abandonment by "the husband of the society of the wife against her will. In "the present case the original withdrawal of the respondent "from his home was with the knowledge and consent of the "petitioner for the purpose of concealment from those in search "of him. He never afterwards voluntarily absented himself "from her, but was prevented rejoining her either by his imprisonment or by her refusal to resume cohabitation." In that case the husband, who was wanted by the police, separated from his wife in the first instance with her knowledge and consent for the purpose of avoiding arrest. While in prison and afterwards he kept up a correspondence with his wife and made repeated endeavours to induce her to return to cohabitation. She, however, refused, and the cohabitation was never resumed. The case is interesting from two points of view. In the first place Sir James Hannen insists upon the necessity for a "voluntary" abandonment by the husband in order to constitute desertion, thus following the principle laid down by Sir Cresswell Cresswell in *Thompson* v. *Thompson* (2); and, secondly, because it provides an instructive contrast to a later case of *Drew* v. *Drew*. (3)

In that case Sir James Hannen found desertion against the husband, who absconded to New South Wales to escape arrest upon a charge of embezzlement. He was subsequently brought back to this country in custody, tried, and sentenced to ten years' penal servitude. The learned judge, however, being satisfied upon the facts that at the time of his flight Mr. Drew had every intention of deserting his wife and did so desert her, held that the period of desertion would continue notwithstanding the fact that he had been brought back to this country in custody. This case formed the high water mark of Mr. Gradwell's argument on behalf of the petitioner. He claimed that just as Sir James Hannen in that case had declined to allow the period of desertion to be interrupted by the mere misfortune of incarceration, so in the present case, where Mr. Williams had been apparently guilty of desertion until the moment when he lost his reason, the period of desertion should also be allowed to continue. This argument is not unattractive, for there is nothing in this case to suggest any kind of hope or belief that if Mr. Williams had continued sane he would in any way have changed the course of conduct, upon which he had embarked with deliberation and in which he had continued without intermission. Furthermore, the whole merits of the case lie on the side of the petitioner.

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(1) L. R. 3 P. & M. 129, 130.

(2) 1 Sw. & Tr. 231.

(3) 13 P. D 97.

I am afraid, however, that the argument rests upon a fallacy, since it is not the physical restraint which has been put upon Mr. Williams as a lunatic which has alone prevented him from returning to his wife or which in itself constitutes the real bar to making a decree against him. It is true that he is restrained much as Mr. Drew was restrained, but whereas Mr. Drew could have formed, and even when in prison could have given expression to, a change of mind and heart towards his wife, Mr. Williams is quite incapable of any such mental or moral activity. This distinction appears to me to touch the core of the present case and to determine it in favour of the respondent.

The regret which I feel at being obliged to refuse a decree to the petitioner is tempered by the consideration that within the lapse of a short time she may have another remedy open to her. The petition must be dismissed. The wife will have her costs.

Solicitors: *Field, Roscoe & Co., for Berkson & Berkson, Birkenhead; Lightbounds, Jones & Co., for Owen, Dawson & Wynn-Evans, Liverpool.*

W. L.

1939
April 24;
May 8.

THE AMAZONE.

Shipping—Possession of a yacht—Diplomatic immunity—Foreign military attaché—Diplomatic Privileges Act, 1708 (7 *Anne, c.* 12), *s.* 3.

Differences having arisen between husband and wife as to the ownership of a yacht, the wife issued a writ in rem for possession of the yacht. The husband was an assistant military attaché on the staff of H.M. the King of the Belgians in London and included in the list prepared by H.M. Government under the Diplomatic Privileges Act (7 Anne, c. 12). He accordingly entered a conditional appearance and moved to set aside the writ on the grounds that he was immune from process and that the yacht was owned by him and in his possession and control. The yacht, which was laid up at Southampton in the hands of Messrs. Thornycroft, who took their orders from the defendant, was registered in the defendant's name.

The plaintiff's case was that the yacht had been bought with her money and that everything the defendant did in connection with the yacht was done as the plaintiff's agent. She alleged that the defendant's right to possession must be decided before the question of diplomatic immunity could be gone into; that the immunity conferred on an Ambassador's staff by the Diplomatic Privileges Act was not comparable with the immunity of a sovereign State; and that, as regards privately owned property, unconnected with the office held by the defendant, the immunity claimed did not exist:—

Held, that first it must be determined whether the defendant did or did not enjoy diplomatic immunity, and, if he did, whether the action impleaded him; that on the evidence he had full diplomatic immunity and had such possession of the yacht as would render it necessary for some legal process to issue to deprive him of it; and that the writ, which in effect commenced an action of detinue against him, must be set aside.

By this motion Commandant Léon Hemeleers-Shenley sought to set aside a writ for possession of the yacht *Amazone* and the warrant of arrest issued at the instance of his wife, Madame Una Hemeleers-Shenley.

The grounds of the motion were that the action impleaded the Commandant who, as Assistant Military Attaché on the staff of the Embassy of H.M. the King of the Belgians in London, was immune from process and was unwilling to submit to the jurisdiction of the Court, and that the yacht was owned by him and in his possession and control. He had entered a conditional appearance to the writ under protest.

By s. 3 of the Diplomatic Privileges Act, 1708 (7 Anne,

c. 12): ". . . . all writs and processes that shall at any time "hereafter be sued forth or prosecuted whereby the person "of any ambassador . . . . authorized and received as such "by her Majesty . . . . or the domestick or domestick servant "of any such ambassador . . . . may be arrested or im- "prisoned or his or their goods or chattels may be distrained "seized or attached shall be deemed and adjudged to be "utterly null and void to all intents constructions and "purposes whatsoever."

The facts are sufficiently summarized in the headnote and are more fully set out in the judgment.

J. V. Naisby for the defendant. The effect of the Diplomatic Privileges Act is that not only an Ambassador but his "domesticks" (which include members of his suite: *Parkinson* v. *Potter* (1)) are immune from the process of the Court. In that case it was held that an attaché could not be sued for rates: see also *Magdalena Steam Navigation Co.* v. *Martin.* (2) If there is any question of the defendant's status the Court should cause inquiry to be made of the Foreign Office, who could reply in writing or instruct the Attorney-General to appear: *Mighell* v. *Sultan of Johore* (3); *Duff Development Co.* v. *Kelantan Government* (4); *Engelke* v. *Musmann* (5); *Fenton Textile Association* v. *Krassin.* (6)

On the plaintiff's own affidavit it is clear that the defendant is in possession of the yacht, and, if in possession and entitled to diplomatic immunity, the writ should be set aside. In effect the defendant is being sued in detinue, which, in the case of a person entitled to diplomatic immunity, cannot be done.

G. St. C. Pilcher K.C. and *Owen Bateson* for the plaintiff. While the proper method of ascertaining the precise diplomatic status of the defendant is no doubt to communicate with the Foreign Office, it is submitted that in respect of an action concerning the ownership of a privately owned vessel, entirely

(1) (1885) 16 Q. B. D. 152.

(2) (1859) 2 El. & El. 94; 28 L. J. (Q. B.) 310.

(3) [1894] 1 Q. B. 149.

(4) [1924] A. C. 797.

(5) [1928] A. C. 433.

(6) (1922) 38 Times L. R. 259.

unconnected with the defendant's professional status, diplomatic privilege does not exist: see *Novello* v. *Toogood.* (1) The statute of Anne only gives very limited immunity, and property is not immune unless it is necessary in the performance of the official duties of the person claiming immunity. The case should not be decided on other cases, such as *The Cristina* (2), which are not strictly under the statute of Anne and where the rights of a sovereign State, based on the comity of nations, are involved.

In any event the mere assertion of ownership or possession is insufficient: see the observations of Lord Maugham in *The Cristina.* (2) The question of the right to possession must, it is submitted, be decided before the question of diplomatic privilege can be gone into. Possession is not finally established by any one circumstance, such as registration or payment of wages. The plaintiff's case is that, the yacht having been bought with her money, whatever the defendant did was done as her agent.

[Reference was also made to *Haile Selassie* v. *Cable and Wireless, Ld.* (3), and *The Jupiter* (*No.* 3). (4)]

[LANGTON J. said that he would adjourn the hearing for the Registrar to communicate with the Foreign Office as to the diplomatic status of the defendant, with liberty to both sides to file further evidence.]

On the adjourned hearing the Registrar reported that the Foreign Office had replied enclosing a certificate that Capitaine Commandant Léon Hemeleers-Shenley was received by H.M. Government as Assistant Military Attaché to the Belgian Embassy from October 25, 1920, and that since that date his name had been included in the list prepared under the statute, of 7 Anne, c. 12 (The Diplomatic Privileges Act, 1708). Additional affidavits, which had been filed, were read and counsel further addressed the Court.

1939. May 8. LANGTON J. This motion raises an interesting and not altogether unimportant point with regard to the immunity enjoyed by Ambassadors and members of their suite in this country. The writ was issued by Madame Una Mary Gardner Hemeleers-Shenley. As originally issued it was against the *Amazone*, a motor-vessel (which is admitted to be a private yacht), but the writ has been amended and is now addressed to the owners and parties interested in the ship *Amazone*. By the writ the plaintiff claims, as sole owner of the yacht, the possession of the yacht. It is, therefore, a possession action as known in this Court. The defendant is Commandant Léon Hemeleers-Shenley, who occupies a position as Assistant Military Attaché to the Belgian Embassy. He has put in a provisional appearance to the writ, and claims by the motion that the writ should be set aside on the ground that he enjoys diplomatic immunity under the statute of Anne.

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(1) (1823) 1 B. & C. 554.
(2) [1938] A. C. 485, 516.
(3) [1938] Ch. 839.
(4) [1927] P. 122 and 250.

When the matter was originally before me there was certain evidence on affidavit by both parties, and I decided that the right thing to do was to cause a letter to be written to the Foreign Office in order that the position of the defendant should be regularly and properly established. That letter was written by the Registrar and an answer was received from the Foreign Office and included in their reply was a certificate which is in these terms. [His Lordship read the certificate, and continued :]

The list prepared under the statute of 7 Anne, c. 12, as I understand it, is one which the Foreign Office prepares from names submitted by the members of the various Diplomatic Corps of those recognized by His Majesty as enjoying diplomatic immunity. It is, therefore, now beyond question that the defendant does enjoy full diplomatic immunity.

Another question arises, which has been the subject of evidence, as to the present possession of the yacht. The plaintiff claims that she has possession of it. The defendant, on the other hand, says that he has possession. I am perfectly satisfied from the evidence that the defendant has such possession of this yacht as would render it necessary for some legal process to take effect in order to deprive him of that possession. With the information which is before me, I do not think it is necessary to go any farther than that. The yacht is for the moment in the hands of Messrs. Thornycroft and is laid up for the winter. Messrs. Thornycroft's representative stated that they have taken their orders from Commandant Hemeleers-Shenley. The yacht is registered in his name in the port of Antwerp. That, to my mind, constitutes sufficient possession for all the purposes of this motion.

Mr. Pilcher, on behalf of the plaintiff, takes two points. He says, first, that possession, for the purposes of a matter of this kind, is not established by such facts as I have enumerated. He points out that any one item in a number of matters to which we are accustomed to refer in order to decide where possession lies would not of itself constitute a proper claim to possession. For example, the payment of wages, or the payment of a servant, may easily and properly be performed by a person acting as agent for the person in possession. I hope I have given that point the attention which it deserves, but on the question of fact the evidence is overwhelmingly in favour of present possession being in the hands of the defendant.

Mr. Pilcher's second point was that immunity differs in quality and extent where, for example, an Ambassador, or a member of his suite, is concerned, as compared with the immunity enjoyed by a sovereign State. Whereas the immunity enjoyed by a sovereign State rests on national considerations, the immunity of an Ambassador is derived entirely from the statute of Anne, and is limited by the wording of the statute. It is said, therefore, that the two matters cannot be considered as being of the same genus, and that I should be wrong in looking for authority to such cases as *The Cristina.* (1) I do not think that it is necessary for me to go into the full implications of any possible differences between the immunity enjoyed by a sovereign State and the immunity enjoyed by the representatives of that sovereign State. In support of his proposition Mr. Pilcher cited *Novello* v. *Toogood* (2), in which case the man claiming immunity was a British-born subject attached to the suite of the then King of Portugal. He appears to have been a person of unusual versatility,

(1) [1938] A. C. 485, 490.

(2) 1 B. & C. 554.

because from the Chief Justice's statement he was a lodging-house keeper, a teacher of languages, and a prompter at the Opera House. He was seeking immunity on the remarkable ground that because he had some appointment with the Ambassador—namely, that of chorister to the Ambassador—the house which he occupied, and which he rented partly as a lodging-house, should, therefore, be immune from any process with regard to rates. The case was decided in banco and was given, as it appears to me, rather more consideration than it merited. The Chief Justice and Bailey J., according to the report, seem to have founded their decision on the point that the goods seized—that is, the goods seized in the lodging-house—were not necessary for the purposes of the Ambassador. But in this case there is no question of the defendant being a person of such vertiginous versatility as was the plaintiff in the case which I have just cited, and that very proper decision is no authority for the proposition that a possessive action can be commenced against a duly accredited member of the Ambassador's suite.

The defendant and his wife are, unhappily, at issue as to the possession of, and ultimately, as I understand it, the ownership of, the yacht which, undoubtedly, belongs to one or other, or to both of them. In the existing circumstances I think I can derive useful guidance from the opinions which have recently been delivered in *The Cristina.* (1) Lord Atkin there said: "The "foundation for the application to set aside the writ and arrest "of the ship is to be found in two propositions of international "law engrafted into our domestic law which seem to me to be "well established and to be beyond dispute. The first is that "the Courts of a country will not implead a foreign sovereign, "that is, they will not by their process make him against his "will a party to legal proceedings whether the proceedings "involve process against his person or seek to recover from "him specific property or damages. The second is that they "will not by their process, whether the sovereign is a party "to the proceedings or not, seize or detain property which is "his or of which he is in possession or control. There has

(1) [1938] A. C. 485, 490.

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"been some difference in the practice of nations as to possible "limitations of this second principle as to whether it extends "to property only used for the commercial purposes of the "sovereigns or to personal private property. In this country "it is in my opinion well settled that it applies to both." Those two propositions are further developed by Lord Atkin in the same case.

Lord Maugham gave his opinion in these terms: "The "immunity of a foreign Government and its Ambassador as "regards property does not stand on the same footing. The "statute of Anne protects the goods and chattels of 'the "'ambassador or other publick minister . . . . received as such "' . . . . or the domestick or domestick servant of any such "'ambassador or other publick minister.' It is clear, I think, "that the property in the goods and chattels would have to "be established if necessary in our Courts before the immunity "could be claimed. The ambassador could not be sued in "trover or detinue: but if the property were not in his "possession and he had to bring an action to recover it I am "of opinion that he would have to prove in the usual way "that the goods were his property. Speaking for myself "I think the position of a foreign Government is the same. "There is, I think, neither principle nor any authority binding "this House to support the view that the mere claim by a "Government or an ambassador or by one of his servants "would be sufficient to bar the jurisdiction of the Court, "except in such cases as ships of war or other notoriously "public vessels or other public property belonging to the "State." (1)

It is to be observed that this opinion of Lord Maugham's is in no sense in conflict with the propositions which are laid down by Lord Atkin, but is in fact complementary to them. What appears to me to result from this clear statement of the law is that, first, it must be determined whether the defendant does or does not enjoy diplomatic immunity. If he does, it is my duty to see whether an action of this kind in any way impleads him or brings property in his possession into issue. In

(1) [1938] A. C. 485, 516.

my judgment it does both directly. It claims actually an arrest of property in his possession and it would be necessary for him personally to come into this Court in order to set up his claim to possession. In effect the writ commences an action in detinue against him; the very class of action which Lord Maugham has said in terms will not lie. The property being in his possession, and he enjoying immunity, I am unable, having no jurisdiction, to go into the matter any further. The motion, therefore, succeeds and the writ must be set aside, with costs.

Solicitors for the plaintiff: *Janson, Cobb, Pearson & Co.*

Solicitors for the defendant: *Stephenson, Harwood & Tatham.*

E. C. M. T.

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May 15, 16;
June 15.

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Shipping—Damages—Loss of life—Doctrine of common employment—Vicarious responsibility—Breach of collision regulations—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 419*—Maritime Conventions Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 3, *sub-s.* 1*—Costs.*

In consequence of a collision between the plaintiffs' and the defendants' vessels several members of the crew of the plaintiffs' vessel lost their lives and one member of the crew was injured. Both vessels were held to blame for the collision in equal degrees. The personal representatives of the deceased men and the man injured recovered damages against the defendants. The defendants sought to recover 50 per cent. of these damages from the plaintiffs.

The negligence for which the plaintiffs' vessel was held to blame consisted of breaches by the officer in charge of her of the collision regulations relating to navigation in fog.

By s. 419 of the Merchant Shipping Act, 1894: "All owners "and masters of ships shall obey the Collision Regulations."

By s. 3, sub-s. 1, of the Maritime Conventions Act, 1911: "Where loss of life or personal injuries are suffered by any person "on board a vessel owing to the fault of that vessel and any "other vessel or vessels and a proportion of the damages is "recovered against the owners of one of the vessels which exceeds "the proportion in which she was in fault, they may recover by "way of contribution the amount of the excess from the owners "of the other vessel or vessels to the extent to which those "vessels were respectively in fault: Provided that no amount "shall be so recovered which could not, by reason of any statutory "or contractual limitation of, or exemption from, liability, or "which could not for any other reason, have been recovered in "the first instance as damages by the persons entitled to sue "therefor":—

Held, that the duty imposed by the regulations is a duty towards the world in general and in no sense a special duty owed by the owners towards their employees, and that the plaintiffs would not have been liable under the doctrine of vicarious responsibility if they had been sued by the personal representatives of the deceased men and the man who was injured, as the defence of common employment would have been open to them; and that consequently the defendants were not entitled to recover the proportion of the damages claimed.

Held, further, however, that the defendants' costs of fighting the loss of life and personal injuries claims were not an item under s. 3 of the Maritime Conventions Act but were part of the damages caused to the defendants, and, as both vessels were equally to blame, the costs should be equally apportioned in accordance with s. 1 of the Act.

MOTION by the defendants, the owners of the steamship

Napier Star, in objection to the report of the Registrar on a reference arising out of a collision in the Irish Sea between the *Napier Star* and the plaintiffs' steamship *Laurentic*.

The facts are sufficiently summarized in the headnote and more fully set out in the judgment. The Registrar said in his report that he did not think that the case was analogous to that relied on by the defendants, *Wilsons and Clyde Coal Co.* v. *English* (1), in which the breach of duty complained of was the failure to provide a safe system of working a mine. It was not suggested that the *Laurentic* was not a well-found ship manned by a competent crew, and the negligence which caused the damage was not the failure to provide a safe system but a misuse of the system, and a casual departure by an employee from a system, which should be foolproof if properly used, could not be said to be a breach of the duty imposed on the employers.

The result was that the claim for damages by members of the crew of the *Laurentic*, if brought against the owners, would have failed by reason of the doctrine of common employment, and that the owners of the *Napier Star* were not entitled to recover from the owners of the *Laurentic* 50 per cent. of the sum which they had paid.

It was also contended that, even if the damages paid to the several claimants were not recoverable, the costs paid by the owners of the *Napier Star* in defending the actions were recoverable as being loss caused to the owners of the *Napier Star* by reason of the collision.

On this point the Registrar held that the costs were incurred in fighting claims for damages founded on the negligence of the *Napier Star*. Those claims, he had found, could not have been brought against the owners of the *Laurentic*, and he saw no reason why, as those damages were not recoverable, the costs incurred in arriving at the proper amount payable should be recovered.

The defendants moved in objection to the report.

Gordon Willmer K.C. and *J. B. Hewson* for the defendants.

(1) [1938] A. C. 57.

The doctrine of common employment is no defence where there is a breach of a statutory duty specifically imposed on the employer. By s. 419 of the Merchant Shipping Act, 1894, the duty to obey the collision regulations is imposed on the shipowner and the master, not on other officers. The junior first officer in charge of the *Laurentic* at the time of the collision, therefore, was acting as the owners' representative, and the owners are vicariously liable.

It is true that in *The Cedric* (1) there is a dictum of Hill J. that the defence of common employment is open to the shipowners when there has been a breach of a collision regulation, but the dictum was entirely obiter, and the point now taken was not argued, as the case was governed by French and not by English law. The reasoning of the opinions of the House of Lords in *Groves* v. *Wimborne* (*Lord*) (2) and the more recent case of *Wilsons and Clyde Coal Co.* v. *English* (3) applies. As in those cases there has been a breach of the statutory duty which the owners entrusted to an agent, in this case the navigating officer, and in performing the owners' duty he was not engaged in common employment with the rest of the crew. The wording of the statute is plain and unambiguous. The Registrar was in error in saying that the negligence was the casual departure by an employee from a safe system and not the failure to provide a safe system; the question of system is immaterial, and further there was no evidence of system before the Registrar.

In *Hedley* v. *Pinkney & Sons Steamship Co.* (4) the Lord Chancellor rejected the suggestion that the master was not in common employment with the crew; but the case turned on the question of unseaworthiness, and the only object in discussing unseaworthiness was on the owners' liability, and inferentially, therefore, the case is in favour of the plaintiffs' contention. Similarly with regard to *Britannic Merthyr Coal Co.* v. *David* (5); *Butler* v. *Fife Coal Co.* (6); *Watkins* v. *Naval Colliery Co.* (7); and *Lochgelly Iron & Coal Co.* v. *M'Mullan* (8), the first three of which turn on breaches of colliery regulations and the last on the Workmen's Compensation Act, the principle on which the owners in each case were held liable was the same; if there is a breach of a statutory regulation on the part of an employee, whether or not it imposes an absolute liability on the employer, it puts the onus on him, and, in the absence of evidence to the contrary, there is prima facie liability, and some of the authorities put the liability higher. In *The Seine* (1) the owners were held responsible for damage caused by the master not obeying the rule to keep to the starboard side of a channel, although, by s. 299 of the Merchant Shipping Act, 1854, damage resulting in such a case was "deemed to have been occasioned by the wilful default of the "person in charge of the deck."

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(1) [1920] P. 193.
(2) [1898] 2 Q. B. 402.
(3) [1938] A. C. 57.
(4) [1894] A. C. 222.
(5) [1910] A. C. 74.
(6) [1912] A. C. 149.
(7) [1912] A. C. 693.
(8) [1934] A. C. 1.

The collision regulations are made not only in favour of the owners of other ships but of the persons and cargo on board the carrying ship, and it is submitted that, had the representatives of the deceased men on the *Laurentic* sued the owners, the doctrine of common employment would not have afforded a defence.

As regards the costs, the expenses to which the defendants have been put in fighting these claims are a direct consequence of the collision, for which both parties were equally to blame, and the costs are recoverable as part of the damages under s. 1 of the Maritime Conventions Act and not under s. 3, and should, therefore, be apportioned.

A. T. Miller K.C. and *E. W. Brightman* for the plaintiffs. The collision regulations were made statutory by the Merchant Shipping Act of 1862, and the present point therefore might have been taken at any time during the last seventy-seven years: for the history of the Rules of the Road at Sea, see Marsden's Collisions at Sea, 9th ed., pp. 50 et seq. Except *The Cedric* (2), which, although obiter, is directly against the defendants' contention, nearly all the cases cited deal with coal-mine regulations, as to which different considerations arise. In those cases the obligation on the employer is direct and personal. He is liable if he has not provided proper plant,

(1) (1859) Swa. 411.

(2) [1920] P. 193.

staff and system, whether he delegates those duties or not. The coal regulations are for the benefit of the employees; the collision regulations impose obligations on the owners for the benefit of all persons that go to sea; they are framed to promote uniformity in navigation, so that everybody knows what the other ship should be doing. The master as well as the owners is mentioned in s. 419 as having to obey the regulations because the navigation at sea primarily is his concern; but every one on board collaborates in some way in the safe navigation of the ship, and the shipowners must delegate those duties. The nature of the duty is the test and not the exact words of the statute. Even in the coal-mine cases there is a clear distinction between duties relating to the actual working of the mine and those which relate to the conditions of safety provided by the system: see per Lord Thankerton in *Wilsons and Clyde Coal Co.* v. *English.* (1) The position of the owners would be quite different, if, for instance, they had failed to provide the ship with proper lights or whistle. Indeed, the real analogy to cases like *Wilsons and Clyde Coal Co.* v. *English* (1) is afforded by the decision in *The Bristol City* (2), where the owners were held personally liable for a failure to provide proper ground tackle and so were unable to limit their liability.

It has been held that the master is in common employment with the crew (*Hedley* v. *Pinkney* (3)), and it would follow, therefore, that, if the master was in charge, the owners would not be vicariously liable; but, on the defendants' argument, if the junior first officer was in charge, they would be liable, an anomalous state of affairs which, it is submitted, the Legislature cannot have intended. Further, if the defendants are right, shipowners could never limit their liability under the limitation sections of the Merchant Shipping Acts for the damages arising out of a collision caused by a breach of any of the collision regulations, the duty to obey which, ex hypothesi, they cannot delegate. By s. 418 of the Merchant Shipping Act the collision regulations must be observed by

(1) [1938] A. C. 57, 70.

(2) [1921] P. 444.

(3) [1894] A. C. 222.

all ships, including foreign ships within British jurisdiction, and must therefore be observed by the persons navigating them; it is incorrect therefore to say that officers, apart from the master, need not obey the regulations.

As regards costs, the Registrar was right, the claim could not have succeeded if brought against the plaintiffs, and therefore no proportion of the costs incurred by the defendants in ascertaining the amount of a liability for which they alone are liable should be recoverable.

Willmer K.C. in reply. As regards limitation of liability under s. 503 of the Merchant Shipping Act, the fault or privity of the owner under that section has nothing to do with his duty under s. 419. In the former section the Court is only concerned with the status of the person on whom the duty rests: see *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (1), whereas under s. 419 it is the nature of the duty.

Cur. adv. vult.

1939. June 15. LANGTON J. read the following judgment: This is a motion in objection to the Registrar's report. On August 18, 1935, a collision occurred in the Irish Sea between the steamship *Laurentic* and the steamship *Napier Star*. On October 23, 1935, Bucknill J. held that both vessels were to blame in equal degree.

Subsequently the personal representatives of six members of the crew of the *Laurentic*, who had been killed in the collision, brought actions against the *Napier Star* and recovered damages in respect of their loss. In addition one member of the crew of the *Laurentic*, named G. Allender, brought an action against the owners of the *Napier Star* for damages for personal injuries sustained in the collision. The Registrar's report, to which exception is taken by the present motion, concerns only the damages recovered and the costs incurred in defending the life claims and personal injury action above described. The owners of the *Napier Star* claimed before the Registrar that they were entitled to recover from the owners

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(1) [1915] A. C. 705.

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of the *Laurentic* one-half of the full amount of the sum which they had incurred by way of damages and costs on the claims for loss of life and personal injuries.

The new and important point of law put forward to support this claim is that by s. 419, sub-s. 1, of the Merchant Shipping Act, 1894, shipowners are enjoined to obey the collision regulations, and that the duty so imposed on them is a direct and personal obligation continuing on them in such a way, and to such an extent, as to render the defence of common employment impossible of application. There was also an interesting point as to whether the costs of defending the actions brought in respect of death and personal injuries should lie where they fall at present, or should, per contra, be brought into account in apportioning the division of loss between the two vessels.

On both of these points the Registrar ruled against the defendants, the owners of the *Napier Star*, and has stated his reasons in a short report which is as clear as it is succinct.

In the first place it is not too much to say that the whole of the contention put forward on behalf of the defendants upon this first point is not only new, but positively revolutionary. As Mr. Miller, for the plaintiffs, has pointed out, the collision regulations first came into force as a complete code, sanctified and buttressed by statutory authority as long ago as 1862. It is true that the exact point which the defendants are now seeking to make was not open for argument before the passing of the Maritime Conventions Act, 1911, but throughout the whole time during which the collision regulations have been in force, whether before or after the year 1911, not only has no one ever suggested that the owners were debarred from pleading the defence of common employment, but it has been, on all hands, assumed and even judicially stated that the defence remained open. It is, of course, no answer to a point of law that thirty or even eighty years have run their course without any one having possessed sufficient acumen to perceive it. It is nothing to the point that the whole legal profession should have assumed to the contrary. Nor is it fatal to its success that judges should have assumed it to be wrong if they have not actually determined the issue. It may be alarming, but it should not be considered detrimental to the merits of the point that it is difficult to see how far-reaching the effect of the proposition contended for may be if it is judged to be sound. On the other hand, when so complete a change of legal thought is sought to be effected, it is right that the new doctrine should be closely and even jealously examined.

It is not denied that, in so far as any judicial authority has ever touched upon the point here put forward, such authority has been uniformly against it. On the other hand, it is claimed with truth that neither the exact point presented here, nor any broader point which must be taken to have covered it, has ever been the direct subject of judicial determination. In *Hedley* v. *Pinkney & Sons Steamship Co., Ld.* (1), a question arose as to the seaworthiness of a ship which had been sent to sea with stanchions and rails on board, but without having these safety appliances properly shipped in place. In the course of his opinion, which was adopted and concurred in by Lord Watson and Lord Macnaghten, Lord Herschell L.C. dealt with the suggestion that the master of the vessel had a special relation vis-à-vis the other members of the crew which prevented him from being regarded as being in common employment with the crew. *Wilson* v. *Merry and Cunningham* (2), which was so fully considered in *Wilsons and Clyde Coal Co.* v. *English* (3), and other cases concerning the doctrine of common employment were referred to by the Lord Chancellor, and he unhesitatingly rejected the suggestion that the master was not in common employment with the crew. The case was, however, really determined upon another ground—namely, that on the principle laid down by the House of Lords in *Steel* v. *State Line Steamship Co.* (4), since the rails and stanchions could well have been shipped at sea, the ship was not in law unseaworthy. A good deal closer to the present point is the observation of Hill J. in *The Cedric* (5):

(1) [1894] A. C. 222.
(2) (1868) L. R. 1 H. L. (Sc.) 326.
(3) [1938] A. C. 57.
(4) (1877) 3 App. Cas. 72.
(5) [1920] P. 193, 198.

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"It was assumed in argument that the liability of the owner "of the *Yvonne Odette* was governed by French law. If it "were governed by English law the owner of the *Yvonne "Odette* would certainly be exempt from actions under Lord "Campbell's Act; the defence of common employment would "be open to him." It was quite fairly urged that this dictum is obiter only, and that it forms no part of the ratio decidendi, but I would point out that it comes from a judge of the highest authority in matters concerning Admiralty and commercial law, and that it expresses his clear and unhesitating view at a time when both the Merchant Shipping Act, 1894, and the Maritime Conventions Act, 1911, had long been in force and had been under his particular purview.

Apart from these two pronouncements, which were thus distinguished and put on one side, the whole of the argument on behalf of the defendants was rested upon decisions which have nothing to do with either ships or the sea. Beginning with *Groves* v. *Wimborne* (*Lord*) (1) Mr. Willmer traced through the line of cases, which are enumerated in the Registrar's reasons, the development of judicial reasoning which has led to the exclusion of the defence of common employment in certain classes of cases governed either by common law principles or, alternatively, by statutory enactment. As I understand his argument it is that, although, where common law principles are concerned, the line of "vicarious liability" has been properly drawn between the sphere of provision of plant and machinery or of a safe working system on the one hand and operation on the other hand, where a statute is concerned one must look only to the words of the statute itself in order to determine where the line should lie. Applying this proposition to the present circumstances, and looking to s. 419, sub-s. 1, of the Merchant Shipping Act, 1894, he claims that the wording of the section is such as to impose a continuing vicarious liability upon shipowners in the matter of obedience to the collision regulations.

Bucknill J. in the present case found the junior first officer of the *Laurentic* to blame in respect of three specific breaches of the collision regulations; first, a breach of art. 15 in not sounding his fog signal in accordance with that rule; secondly, a breach of art. 16 in not proceeding at a moderate speed in fog; and, thirdly, a breach of art. 16 in not stopping on hearing a fog whistle forward of his beam. The argument accordingly runs in this way. By the section shipowners are enjoined to obey the collision regulations. By this same section a continuing duty is laid upon them which they may delegate, but in respect of which they cannot escape vicarious liability. The duty so laid upon them is a duty towards their employees, and being their own duty they cannot avail themselves of the defence of common employment to escape their own duty. I gathered during his close and compact argument, that Mr. Willmer was prepared to concede that, if the matter was one which rested upon common law principles, the task of navigating a ship would properly belong to the sphere of operation rather than to that of provision of material or of a safe system of working. He contends, however, that there is no room for the application of common law principles where the matter is governed by the strict words of the statute.

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(1) [1898] 2 Q. B. 402.

To probe this argument to the full it is necessary to look a little more closely at the wording and meaning of s. 419. Does this enactment really place upon a shipowner a duty towards his employees which, to use the language of Lord Wright in *Wilsons and Clyde Coal Co.* v. *English* (1), falls within the master's province of duty and not within the servant's province of duty to his fellow servants? In this connection I would cite also from Lord Wright's opinion the following illuminating passage: "I have chosen these few "examples to show that the doctrine of common employment "which was hinted at in connection with a butcher's cart and "has roamed in its application to colliers, seamen, railwaymen, "apprentices, chorus girls, and, indeed, every sphere of "activity, has always distinguished between the employer's "duty to the employee and the fellow-servant's duty to the "employee. The rule is explained on the ground that the "employee by his contract of employment agrees with

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(1) [1938] A. C. 57, 80.

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"his employer to assume the risk of his fellow-servant's "negligence."

At the outset of this inquiry it may be pertinent to observe that the duty imposed by this sub-section is not upon owners only but also upon masters of ships. Whatever else the master may be, he is always the servant of the owner: see *Hedley* v. *Pinkney & Sons Steamship Co., Ld.* (1), so that here, in contradistinction to any statutory case under the Coal Mining Acts or the Factory Acts, such as *Groves* v. *Wimborne* (*Lord*) (2), we have a duty which in its very first instance is imposed equally upon the owner and one class of his servants. Surely one may ask how such a duty can be said to stand in any way in pari passu with the class of duty upon which this contention has been founded. How can it be said to be within the employer's province of duty and not within the servant's province of duty to his fellow servants? The duty which is here imposed upon the owner seems to me to be a duty towards the world in general and in no sense a special duty towards his servants. Indeed it is a class of duty which by the very words of the statute one class of his servants also owes to the world in general.

If I have reached any understanding at all concerning the doctrine laid down by the House of Lords in *Wilsons and Clyde Coal Co.* v. *English* (3), it is that in that class of case the employer cannot be allowed to escape liability to his workmen by setting up the defence of common employment where the negligence which has caused the accident is a neglect of duty which he, the master, owes especially to his employee. It is because, and just because, this duty is laid upon the employer by statute *towards his employee* that he may not even by delegating the duty to another escape liability for a breach of that statutory duty. It would seem to me to be a large extension of this doctrine to hold that, where an owner has a general duty towards all the world, it is to be construed as if it were a special duty to the employee in a case where it is perfectly obvious that the Legislature

(1) [1894] A. C. 222.
(2) [1898] 2 Q. B. 402.
(3) [1938] A. C. 57.

never for a moment contemplated that any such special duty should be imposed.

If one turns now to another aspect of this matter, namely, the ground upon which the rule in favour of the defence of common employment is explained by Lord Wright, the argument here adduced by the defendants is further attenuated.

The ground of the rule, according to the citation which I have made above, is: "That the employee by his contract "of employment agrees with his employer to assume the risk "of his fellow servant's negligence." Looking at this matter from a practical point of view it is difficult to imagine a better or clearer case of agreed acceptance of risk than in the ordinary case of a ship's company. Every one from the master downwards to the junior ordinary seaman (I almost said to the cabin-boy) is fully aware of the fact that his own safety lies in the keeping of his shipmates, and their safety in his keeping, and that negligence on his part in anything connected with the navigation of the ship may put the safety of the whole ship's company at risk. One starts, therefore, with a class of case to which the defence of common employment is most peculiarly applicable. Is there really anything in the wording of the statute which should take the case out of the class to which it primarily belongs? The owner, say the defendants, is especially enjoined to obey the regulations, but one may reasonably ask in what capacity is he so enjoined. When one finds the owner coupled in the same sentence with the master, who is his own principal delegate, one is driven to inquire into the possible reasons for this unusual collocation. Mr. Miller pointed out that in the first statute by which the collision regulations were sanctioned, that of 1862, s. 27, which is the section corresponding to s. 419 of the Act of 1894, the wording is strangely in dissonance with the argument adduced for the defendants. Taking only the relevant words, the section runs as follows: "All owners and masters of ships shall be bound to take "notice of all such regulations as aforesaid, and shall . . . . "be bound to obey them, and to carry and exhibit no other "lights and to use no other fog signals than such as are "required by the said regulations; and in case of wilful "default, the master, or the owner of the ship if it appear "that he was in such fault, shall . . . . be deemed to be "guilty of a misdemeanor." It is at once apparent on looking at this section which, with the two sections immediately preceding it, forms the ground-work for the present s. 419, that the Legislature in 1862 obviously contemplated cases of infringement of the collision regulations in which the owner could never have been in default. Indeed, it seems to me arguable whether the owners may not have been included in these sections in the first place rather qua shipmasters than qua employers. One has to remember that eighty years ago, especially in the coasting trade, there were still many people who doubled the rôle of shipowner and shipmaster, and it might well be for that reason that the duty to obey the regulations was laid equally upon owners and masters.

Upon consideration, however, I think that the sounder view is that which Mr. Miller was content to put forward—namely, that, in so far as the regulations deal with the provision of proper material, as, for example, navigation lamps and fog signalling apparatus, etc., the owner has a duty to obey the regulations, whereas, where actual navigation is concerned, the master, as being the individual in charge, is responsible in the first place, and the owner is only responsible at all if he happens to be carrying out the duties of a shipmaster. This reading of the various Acts which have dealt with duty under the collision regulations has not only the merit of being in accordance with the just apportionment of relative responsibility, and of being completely easy of comprehension, but it also falls into line exactly with the broad division between the sphere of provision of material on the one hand, and operation on the other, which has been adopted as the guiding principle in the cases resting on the common law.

Another test of this matter which was put forward by Mr. Brightman, on behalf of the plaintiffs, was that, if the defendants' contention be correct, it is difficult to see how the sections of the Merchant Shipping Act dealing with limitation of liability can be applied in the majority of cases arising out of collision. By s. 503 of that Act, adopted and expanded in later Acts of Parliament, for example, the Merchant Shipping Act, 1900 (63 & 64 Vict. c. 32), the owners of British or foreign ships are entitled to limit their liability in respect of damage and losses caused by reason of the improper navigation of their ships where the occurrence has taken place without their actual fault or privity. But if, in every case where an infringement of the collision regulations has led to the occurrence in question the shipowner is personally liable for the fault, there appears to be no room for the operation of the proviso by which alone limitation can be secured. It is a somewhat staggering thought that, if this result be correct, not only has Parliament unwittingly set at naught the provisions of at least two of its own statutes, but during the last thirty years some hundreds, if not thousands, of cases on the subject of limitation of liability have been wrongly decided.

Mr. Willmer's answer to this point is that for the purposes of limitation of liability an owner has not quite the same meaning as in s. 419. In reply, he was driven to restrict the operation of his doctrine in more than one respect. In the end the owners, for the purposes of this special doctrine, were restricted to owners of British ships, and to cases where, first, the ship is in charge of some one other than the master, and, secondly, where the ship is found to be in fault for a specific breach of a specific regulation. Clearly a duty, such as is laid by s. 419 in terms upon the master, could hardly be retransferred to the owner where the master was in charge, and Mr. Willmer did not contend for such an absurdity. Again, there would be difficulties in applying this highly specialized doctrine where the ship had been found in fault for bad seamanship not specifically dealt with in the regulations. Indeed, it was conceded, as I understood, that, since the owner could never be vicariously liable in a case where the master was in charge of the ship, he would be so liable in a case where the collision was caused by a failure to blow a fog signal if the mate were in charge, not liable in the same circumstances if the master were in charge, and not liable whoever were in charge if the

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cause of the casualty were an act of atrocious seamanship such as anchoring unnecessarily in thick weather in the middle of a crowded fairway. In the end, therefore, it was not surprising that this in-and-out responsibility, with its swift and rather bewildering changes of incidence, produced a strange kind of owner somewhat different from the normal individual to whom the Merchant Shipping Acts generally refer. Mr. Willmer then sought to distinguish between the owner, as referred to in s. 503, and the owner whom he had created for his special purpose in s. 419, by saying that, whereas in applying the latter section one had to look at the nature of the duty, one was only concerned in s. 503 with the status of the person upon whom the obligation rested.

I appreciate to the full that in such cases as *Lennard's Carrying Co., Ld.* v. *Asiatic Petroleum Co., Ld.* (1), the Court was concerned entirely with the status of the individual attacked, in order to discover whether that individual could properly be described as the owner for the purposes of the Act of Parliament, whereas, in cases where the application or non-application of the doctrine of common employment is in issue, the Court must look at the nature of the duty. But however jealously the Court may restrict its area of vision for the purposes of s. 503 in order to be certain that privity shall not be alleged against the owner where the real fault lies with an employee, I cannot perceive how this benevolence will avail him if, when once the ownership has been thus narrowly ascertained, the owner is unable to escape from vicarious liability.

I am not sure that I have done full justice to all the arguments put forward by Mr. Miller and Mr. Brightman for the plaintiffs, but, since I am accepting the view which they put forward, any omission of this character is probably of small importance. So far as the proposition for which Mr. Willmer contends is concerned I have, I hope, said enough to make it clear why I do not think that such is the law of England.

The other matter put before me, which concerns the costs of fighting these claims, stands, to my thinking, upon a totally different footing. In order to appreciate this matter fully, it is to be borne in mind that one starts from the position that there has been negligence on both sides. These claims must therefore be taken to have arisen just as much from the negligence of the *Laurentic* as from that of the *Napier Star*, and the fact that they have been put forward only against the *Napier Star* should not cloud one's view as to their real cause and origin.

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(1) [1915] A. C. 705.

For the plaintiffs it is said that if one looks at the proviso to s. 3, sub-s. 1, of the Maritime Conventions Act, 1911, it will be apparent that these claims could never have been recovered in the first instance as damages against the White Star Line. This is perfectly true if the judgment which I have just been at pains to deliver is correct. On the other hand, Mr. Willmer pointed out, with what appears to me still greater force, that the costs here claimed are not an item claimed under s. 3, sub-s. 1, at all. They are, indeed, really claimed under the first section of the Act, and constitute part of the damage or loss actually caused to the owners of the *Napier Star*. Because of the negligence of both vessels the *Napier Star* has been forced to meet these claims, and the reasonable costs of defending the claims form a part of her damage. The question whether or not the claims might or might not have been launched against the *Laurentic*, although a far more important and interesting point, has nothing to do with the costs of defending these claims in themselves. It is a mere coincidence that the two points happen to have been raised at the same time, a coincidence which may perhaps be traceable to the unusual ingenuity of the counsel engaged. I am of opinion that these costs ought to be apportioned, and in that respect, but in that respect only, I differ from the conclusions of the Registrar.

As regards the costs of the motion, the defendants must pay their own costs and three-quarters of the costs of the plaintiffs.

Solicitors for the defendants: *William A. Crump & Son.*
Solicitors for the plaintiffs: *Hill, Dickinson & Co.*

E. C. M. T.

1939
May 26.

PARKINSON *v.* PARKINSON.

Divorce—Presumption of death—Husband's petition—Deed of separation—Continual absence of respondent for over seven years—No reason to believe that respondent was either alive or dead—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 8, *sub-s.* 2—*Offences Against the Person Act,* 1861 (24 *&* 25 *Vict. c.* 100), *s.* 57.

Under s. 8, sub-s. 2, of the Matrimonial Causes Act, 1937, the fact that for a period of seven years or upwards the respondent has been continually absent from the petitioner and the petitioner has no reason to believe that the respondent has been living within that time, is evidence that the respondent is dead, until the contrary is proved.

A petitioner for a declaration of presumption of death of his wife and a decree dissolving the marriage could not adduce evidence to show that the respondent had been living or had died within that time, though she had not been seen nor heard of for eight years :—

Held, (1.) it was for the petitioner to give evidence whether he had no reason to believe that his wife was living within that time, but, as the facts as disclosed left the matter one of pure speculation, the Court was entitled to hold that there was no reason to believe that she had been living within that time, therefore under sub-s. 2 the Court ought to be satisfied that reasonable ground existed for supposing that she was dead.

(2.) The fact that the wife was continually absent from the petitioner under a deed of separation did not debar the petitioner from claiming the advantages of the sub-section.

HUSBAND'S PETITION.

In this petition dated June 24, 1938, the petitioner sought under s. 8 of the Matrimonial Causes Act, 1937 (1), a decree of presumption of his wife's death and of dissolution of marriage. He prayed for the exercise of the discretion, notwithstanding an adulterous association which terminated in 1925.

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(1) 1 Edw. 8 & 1 Geo. 6, c. 57, s. 8, provides : "(1.) Any married "person who alleges that reasonable grounds exist for supposing "that the other party to the "marriage is dead may present a "petition to the court to have it "presumed that the other party "is dead and to have the marriage "dissolved, and the court, if "satisfied that such reasonable "grounds exist, may make a "decree of presumption of death "and of dissolution of the marriage.

"(2.) In any such proceedings the "fact that for a period of seven "years or upwards the other party "to the marriage has been continually absent from the petitioner, and the petitioner has no "reason to believe that the other "party has been living within that "time, shall be evidence that he or "she is dead until the contrary is "proved."

The marriage took place at Burnley in August, 1919. There was no issue. According to the facts set out in the affidavit in support filed in accordance with r. 4 (*h*) of the Matrimonial Causes Rules, 1937, the last place of cohabitation was at Burnley in 1922, when the wife left her husband against his wish and expressed the intention of never returning to him.

In July, 1922, the parties executed a deed of separation, which, however, included no covenant by the petitioner to make any provision for his wife. The petitioner last saw his wife by way of an accidental meeting at Burnley in 1928, and her father and an aunt who had brought her up stated that they had not seen nor heard of her for eight years prior to the petition. The petitioner had made inquiries, and advertisements for information of the wife's whereabouts had been issued, without result.

In July, 1938, the registrar made an order for further advertisements to be published as to the whereabouts of the wife, and they produced no information.

Evidence having been completed, Bucknill J. required argument as to the effect of the section where there was no evidence one way or the other as to the respondent being alive or dead within the seven years immediately preceding the petition.

William Latey for the petitioner. Though the petitioner cannot adduce evidence under sub-s. 1 of s. 8 of the Act of 1937 to show that specific grounds exist for supposing that his wife is dead, he is entitled to rely on sub-s. 2, which imports the established rule of evidence set out in Stephen's Digest, 12th ed., art. 108: " A person shown not to have "been heard of for seven years by those (if any) who, if he "had been alive, would naturally have heard of him, is "presumed to be dead unless the circumstances of the case "are such as to account for his not being heard of without "assuming his death; but there is no presumption as to the "time when he died, and the burden of proving his death "at any particular time is upon the person who asserts it." This principle was endorsed by Hill J. in *Ivett* v. *Ivett* (1), in regard to a question of the disappearance of a husband. This relief to a spouse, where the other spouse simply vanished without there being any evidence of the latter's death, was recommended by the Royal Commission on Divorce of 1912, and it is a logical corollary to the provision in s. 57 of the Offences Against the Person Act, 1861, whereby, if a person marry a second time whose husband or wife shall have been continuously absent for the space of seven years and shall not have been known by such person to be living within that time, he or she cannot be found guilty of bigamy. Under that section the onus is not upon the defendant but on the prosecution to show that there were reasonable grounds to suppose that the vanished spouse was alive within the seven years: *R.* v. *Curgerwen.* (2) Nor does the fact of an agreement to separate shift the onus on to the defendant: *R.* v. *Faulkes.* (3) In the present case the fact that all reasonable inquiries have elicited no information as to the respondent is quite sufficient to bring the petitioner within sub-s. 2. The seven years having elapsed, all the petitioner need say in the circumstances is that he has no reason to believe that his wife is alive, and, there being no evidence to the contrary, he is entitled to the relief which he claims, subject to the other question of discretion in view of his own lapse.

There was a similar case of *Jones* v. *Jones* before the learned President last year (November, 1938, unreported). There was a deed of separation in 1917. The husband last heard of his wife in 1919. Between that time and 1938 he made inquiries in vain and her relatives saw and heard nothing of her. Counsel relied on sub-s. 2 of s. 8, and the learned President, before granting a decree, observed that the second sub-section appeared to provide

(1) (1930) 143 L. T. 680.
(2) (1865) L. R. 1 C. C. R. 1.
(3) (1903) 19 Times L. R. 250.

a substantive remedy on proof of facts which had hitherto merely provided a defence to a charge of bigamy.

Cur. adv. vult.

1939. May 26. BUCKNILL J. delivered judgment as follows: This is a case which perplexed me a little, and I have had great assistance from Mr. Latey, who appeared for the petitioner in the case. The petitioner, Fred Parkinson, is asking for the dissolution of his marriage to Alice Parkinson, his wife, on the ground that there are reasonable grounds for supposing that she is dead; and the substantive case made on behalf of his petition is, that the wife left him about the end of May, 1922, and that he has not seen her since about the end of 1928, and with regard to her being heard of, about the year 1930. He relies upon s. 8, sub-s. 2, of the Matrimonial Causes Act, 1937.

Now the facts lie in a small compass, because the petition is undefended. The parties were married in 1919, and at that time the husband, the petitioner, was twenty-four years old, and the wife was twenty years old. They both lived in Lancashire. She was a cotton weaver, and he was at that time a tram-car driver. In 1922 the wife left the husband, said she was going to Blackpool, and was going for good; and in July of 1922 the parties entered into a deed of separation, which recited that unhappy differences had arisen between the husband and the wife by reason whereof they had agreed to live separate and apart, and then the deed takes the usual course: he agrees that his wife shall live separate and apart, free from his control and authority; and she agrees to live apart from him and not to seek restitution of conjugal rights, or in any way to annoy or interfere with him.

Of course the deed has this effect, that it prevents him from asking for a decree of dissolution of the marriage on the ground that his wife deserted him, because during the material time they were living apart under the deed. He said in his evidence, and I see no reason to doubt the truth of his evidence, that he last saw his wife, by accident, in Burnley in 1928; that he had a few casual words with her and went, and that he saw no more of her at all until he started these proceedings. The petition in this case was filed on June 24, 1938. He had made a few inquiries about her, in Blackpool, in 1937. They told him at Blackpool that she had gone to Cleavers, from Cleavers they said she had gone to Lancaster, from Lancaster they said she had gone to Salford, and from Salford they said she had left very hurriedly. In the meantime he himself had been on a visit to Ireland for a year, in 1925 and 1926; he also lived for a time with another woman: they parted in 1925.

Now that is all the evidence and is as far as the petitioner could go; but he has obtained leave to file an affidavit by the father of his wife, Mr. Frank Palmer, at Briarfield, near Burnley, in which Mr. Frank Palmer swore that he once saw the respondent, over eight years ago, at Briarfield. He really knows no more about her than that. There is another affidavit by Margaret Slater, the aunt of the wife in this case, which stated that she had not seen the petitioner's wife for more than eight years; that she had brought the respondent up since she was eight years old, and Mrs. Slater swore that the last time she saw her was about eight years ago, in a public house at Briarfield. Advertisements, which have been filed and exhibited in an order, were placed in the Daily Telegraph and News Chronicle, at the beginning of this year, asking for information of the wife's whereabouts. No information of any kind has been received as the result of this advertisement. That is all the evidence in the case.

One now has to look at the section of the Act, to see what the law is. The new provision of the Act grants to a spouse the right to a dissolution of his marriage if he can satisfy the Court that there are reasonable grounds for supposing that his wife is dead. Now it is quite clear that "disappearance" is not synonymous with "death": indeed, it may be that a person disappears in order to avoid the risk of death, and where a woman, apparently in good health and under the age of forty and married is not heard of in her native town for this period of time, I do not think I could say that

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I was satisfied that there were reasonable grounds for supposing that she was dead.

In order to get over the difficulty which exists of proving death where the party has merely disappeared, sub-s. 2 of s. 8 has been enacted, and it is under this sub-section that Mr. Latey bases his case. That sub-section is in these words: "In any such proceedings [that is, for dissolution of the "marriage and on the ground of the death of the party] the "fact that for a period of seven years or upwards the other "party to the marriage has been continually absent from the "petitioner, and the petitioner has no reason to believe that "the other party has been living within that time, shall be "evidence that he or she is dead until the contrary is proved."

It is important to mention at first that continual absence from the petitioner, in a case where the wife has bound herself to live separate and apart from him, proves very little, and that therefore it is rather difficult to say that in a case of this kind the sub-section applied. But the researches by Mr. Latey brought these facts to my notice: first of all, that this section follows very closely the wording of s. 57 of the Criminal Law, Offences Against the Person Act, 1861, which deals with the offence of bigamy, and has this proviso: "Provided that nothing in this section contained shall extend "to any second marriage . . . . or to any person marrying "a second time whose husband or wife shall have been con-"tinually absent from such person for the space of seven "years then last past, and shall not have been known by "such person to be living within that time."

The first part of that proviso is identical with sub-s. 2 of s. 8 and uses the precise words: "shall have been continually "absent from such person for the space of seven years"; and Mr. Latey argued that whereas a continual absence for seven years, since 1861, provided a defence to a charge of bigamy, the new Act of 1937 now gives him, the petitioner, a substantive right to get his marriage dissolved, and he informed me that the learned President, in a case unreported, of *Jones* v. *Jones*, which I think was decided in November of 1938, in that case pointed out the similarity between the two sections

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that I have referred to, and indicated that in his view the new Act was intended to provide a substantive remedy, on proof of facts which had hitherto provided a defence to a charge of bigamy. The words certainly are most general in their terms. All the petitioner has to prove is that his wife has been continually absent from him; there is no limiting word dealing with a case where there has been a deed of separation: and, indeed, the words are so wide that they would seem to cover even the case where the petitioning husband has himself deserted the wife and left her for seven years.

That that is the law under the Act of 1861 is, I think, clear from the case of *R.* v. *Faulkes* (1), where the husband was charged with bigamy and it appeared from the facts proved that he had, in fact, deserted his wife and that was the reason why she had been continually absent from him for the space of seven years then last past. It was argued in that case that the proviso about continual absence did not apply in a case where the man had deserted his wife. Kennedy J., the trial judge, directed the jury to find a verdict of acquittal and said, as to the first contention put forward by the prosecution, that he could not make the Legislature say what he thought it did not intend to say. In his opinion "absent" meant "not with" and the proviso applied equally to what might be called innocent parties as to wilful deserters.

So on the first point I am satisfied now that the fact that the wife was continually absent from the petitioner, under a deed of separation, does not debar the petitioner from claiming the advantages of this sub-section.

Then there was a second point which troubles me, and that was this: whether the burden lay on the petitioner to satisfy the Court, in a case of this kind, that he had no reason to believe that his wife was living within those seven years? Mr. Latey argued that here again the same rule applied as applied in the Act of 1861, and he invoked the decision in the Court for Crown Cases Reserved, in *R.* v. *John Curgerwen* (2), where the Court laid down that it is for the prosecution to satisfy the Court that the man charged knew that his wife was living within the seven years, and it was not on the husband, the man charged, to satisfy the Court that he did not know. Mr. Latey argued that that was so also in this case; there is no burden on the petitioner, under sub-s. 2, to satisfy the Court that he had no reason to believe that his wife was living within the seven years.

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(1) 19 Times L. R. 250.

(2) L. R. 1 C. C. R. 1.

One important thing to notice, when one compares the two sections, is this: that although the first part of s. 57 has been carefully followed in sub-s. 2 of s. 8 of the Act of 1937, the latter part of the section has not been followed. Sect. 57 of the Act of 1861 goes on to say "and shall not have been "known by such person to be living within that time." On the other hand, sub-s. 2 of s. 8 says: "and the petitioner "has no reason to believe that the other party has been "living within that time."

I have got to ask myself: How is it possible for the Court to know whether the petitioner has any reason to believe that his wife has been living within the seven years, unless the petitioner himself gives evidence on the point? It is quite impossible for the Court to delve into the undisclosed mind of a man and satisfy itself whether he has no reason for the belief of a particular fact. In my view the marked difference in the language in the second part of the sub-section indicates that under sub-s. 2 it is for the petitioner to give evidence as to whether he had no reason to believe that his wife was living within that time.

That brings me to the last point which caused me some perplexity. That is whether, in a case of this kind, on these facts, the Court could say that the petitioner had no reason to believe that his wife was living within the last seven years? It seems to me that the facts as disclosed leave the matter one of pure speculation. There is no reason to say that she has been alive within that time, any more than there is any reason to say that she has been dead. It is a matter of pure speculation. If it is a matter of pure speculation, I think the Court is entitled to hold that there is, in fact, no reason to believe that she has been living within that time.

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Therefore, it seems to me that the petitioner has brought himself under sub-s. 2 of s. 8, and that there is evidence that the wife is dead and that on that evidence the Court ought to be satisfied, and is satisfied, in this case that reasonable grounds exist for supposing that she is dead. That being so, I make the decree of presumption of death, and a decree nisi.

Solicitors: *Kinch & Richardson, for Donald Race, Burnley.*

W. L.

LYNCH *v.* LYNCH.

1939
April 27.

Divorce—Desertion—Wife's petition for dissolution—Wife's former petition for nullity on file within three years immediately preceding petition for divorce—Continuing desertion notwithstanding—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*), *as amended by Matrimonial Causes Act,* 1937 (1 *Edw. &* 1 *Geo.* 6, *c.* 57), *s.* 2.

A wife praying for the dissolution of her marriage on the ground of desertion had previously petitioned for a decree of nullity on the ground of her husband's alleged incapacity. The previous petition had not been proceeded with, and, after the proceedings had been dropped, the parties had resumed cohabitation for a time. The wife had instructed her former solicitor to take steps to have the previous petition dismissed, but in fact it remained on the file up to a week before the presentation of the petition for divorce :—

Held, that the right way to regard the question whether the presence on the file of the nullity petition had the effect of an order on the spouses to keep them apart so as to bar continuing desertion was to treat the matter as though it were pleaded. The husband was not entitled to take advantage of the fact of the existence on the file of the Court of the nullity petition, of which he was wholly ignorant, which did not affect his conduct in the least and which, even if he had known it, he disregarded for the purpose of enjoying the society of his wife. The petitioner was entitled to her decree.

WIFE'S UNDEFENDED PETITION for divorce on the ground of desertion.

The parties married on August 14, 1915. On June 24, 1924, the wife petitioned for a decree of nullity of marriage on the ground of the husband's alleged incapacity. This petition was served on the respondent, and he attended for examination by the medical inspector. The wife was advised not to proceed with the petition for nullity, and she instructed her then solicitor to have the petition dismissed. In fact, however, it was not dismissed, though the spouses came together again, until March 11, 1938.

In answer to the wife's present petition dated March 17, 1938, based on desertion for three years and upwards immediately preceding the presentation of the petition, the husband denied desertion by himself, and countercharged her with desertion ; but he did not further contest the petition.

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It was established by the evidence that in 1933 or 1934 the husband deserted the wife and had not lived with her since. The question arose whether under *Stevenson* v. *Stevenson* (1) and recent decisions giving effect thereto, desertion was suspended while the former petition remained on the file of the Court.

C. L. Beddington for the petitioner.

1939. April 27. HENN COLLINS J. gave judgment as follows :—

This is a wife's suit for dissolution of marriage on the ground of her husband's desertion, which was filed on March 17, 1938. The husband and wife were married on August 14, 1915, being both members of the theatrical profession, and they lived together, as and when the exigencies of their profession permitted, down to some date in 1924, when the wife presented a petition for nullity of the marriage. The petition was presented on June 24, 1924. That petition was served on the husband and went forward in the ordinary way until July of 1924 or thereabouts, when the wife, on advice which she had received, instructed her then solicitor to get the petition dismissed. She seems to have thought no more about it from that date onwards.

The spouses did not come together again, not, as I think, because they were antagonistic, but because the exigencies of their calling took them to different parts—abroad and in England. In August, 1928, they were offered a professional engagement in which they might both appear together, either in the same company or as partners in an act. They embraced that opportunity and they both joined the same theatrical company and played in it. During that time they lived together as man and wife in the sense in which they had originally done so. That continued for a period of three months. During that time the wife was shown by her husband a letter which he had received from the solicitors acting for him in the nullity suit which made it clear that he, the husband and now the respondent, had been notified that the petitioner, his wife, was not going on with the nullity suit.

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(1) [1911] P. 191.

Of course it is impossible for the wife at this length of time to repeat exactly what was in that letter or what particular frame of words were used, but she has satisfied me that it was sufficient to give the husband notice that he need concern himself no more with the existence of that suit. After some three months together the husband lost his post in the theatrical company and obtained work elsewhere and meanwhile the wife continued in the company. They did not thereafter meet until July of 1930. By that time, or rather for a week in July of 1930, the wife was not working. The husband was at Birkenhead and as she was out of work she turned to him for support and went to Birkenhead and they lived together peacefully for that week. She then resumed her profession, and they worked apart by reason of the exigencies of their profession.

If the matter rested there, merely upon the question of fact whether there was desertion, I should be inclined to say that there had been none. I think the proper inference upon the facts so far is that they were living apart, in so far as they were apart, by reason of their separate professional activities and neither against the will of the other. But, in 1933, the petitioner ceased to be upon the stage and was therefore left to her own resources. She does not appear to have kept at any time in close touch with her husband or he with her, but in September, 1933, having heard that he proposed to start a theatrical agency, she went to Birmingham where he had a permanent address and saw him there. She there asked him to set up a home with her, to which his reply was that he would go on as they were for a bit and would see about it. He never did, in fact, see about it, and he never communicated with her again.

In 1934, that is to say some time in the following year, his wife, who was living with her parents, wrote to him and said she was unhappy and wanted to see him, to which his reply was again, from Birmingham, that he was trying to fix up work in Birmingham and could not get down to

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Hounslow to see her. It occurs to me that, if the suggestion of seeing his wife had been one which commended itself to him, nothing would have been easier for him than to send the money down to his wife for her to go to him, and I regard the fact that he was trying to fix up work in Birmingham and could not get down to see her as a mere specious excuse. Coupled with the fact of his extremely cold reception of her original plea in 1933 that they should set up home together and his lapse into silence thereafter, I think the proper inference is that he had an intention to desert his wife and that that intention had effect in his complete failure to support her. In those circumstances I think there was, in fact, desertion by him.

That finding is always subject to the difficulty which is raised by the fact, which was unknown to both spouses, that the nullity suit, now some fourteen years old, had not, in fact, been dismissed, and in spite of the now petitioner's instructions to her then solicitor it had remained on the file. That raises a point of some difficulty because prima facie the presence upon the file of a suit for nullity, or for a judicial separation, or for divorce, has the effect of an order upon the spouses to keep them apart and, so long as that is so, it can be urged by either spouse charged with desertion that he or she, as the case may be, has obviously a lawful excuse for not rejoining the other spouse. But, in this case, both the spouses believed that there was no such bar; in fact, both believed that the suit had had a technical as well as a practical end.

In those circumstances, what is the position in law? Desertion is fundamentally, apart from actual acts, a question of intention. So far as one can be certain of anything that operates in the human mind, one can be certain of the fact that the existence of that suit on the file (a matter of which the husband in this case knew nothing) cannot in the very least have affected his conduct at any time, much less after September, 1933. Therefore, if it is to stand in the way of the wife on her present petition, it is a mere technicality and one brought about by circumstances for which she is not in the least responsible. But I must not let considerations of that kind weigh with me in considering what the law applicable is in the circumstances. None the less, one not unnaturally approaches it from the point of view that one assumes if possible that the law does not work hardship.

It seems to me that the right way to regard this question is to treat the matter as though it were pleaded. That does not mean that the Court can secure, as it were, any advantage from bad pleading, or assume anything not to be pleaded which ought to be pleaded, or that anything was pleaded which ought not to have been pleaded, but, having ascertained the fact, then ex post facto to draw the pleadings. I think that if that hypothesis is applied in this case the result will appear to be that the husband was not entitled to rely on the appearance on the file of the nullity suit. I think that the right way to regard it, now that I know the facts, is to treat them in some such way as this. The petitioner starts by saying: "You, my husband, deserted me in or about "September, 1933, and that desertion has continued down to "the date of the petition"; to which the husband notionally answers: "But during the whole or some material part of "that time, and in particular during the latter part, the last "three years, I was precluded from rejoining you as your "husband by reason of the existence on the file of the Court "—had I the curiosity to go and look there, which I did not— "of a suit for nullity." To which the wife would plead in answer: "You, by your conduct, are estopped or precluded "from doing any such thing because you have over a period "since that petition was upon the file (for two periods to be "accurate) enjoyed my society and consortium as your spouse "and you cannot, in the language of the common law, blow "hot and cold."

In that state of things the issues raised by those pleadings come before this Court. What is the proper decision on that state of pleadings—pleadings which have the singular advantage, one observes, of being drafted after the facts are ascertained. My answer is that the wife's replication is well founded. The husband is not entitled to take advantage of

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a fact of which he was wholly ignorant—it did not affect his conduct in the least—and which, even if he had known of it, he disregarded for the purpose of enjoying the society of his wife. That view, of course, is founded on the fact that the existence of the suit did not affect the spouses' minds in the least. As I have already indicated, if the existence of the suit did constitute a bar, it would be the merest technicality, in respect of which, in so far as I had any discretion in the matter, I should not exercise it in favour of the husband.

The result is that I think the petitioner is entitled to her decree.

Solicitors: *Rye & Eyre.*

W. L.

EAVES *v.* EAVES.

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April 19, 28.

Divorce—Desertion—Deed of separation—Subsequent marital intercourse—Husband's refusal to resume married life—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*), *as amended by Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2.

In a deed of separation, acknowledged at the time of its execution in 1932 by husband and wife as temporary, it was provided that if they became reconciled and returned to cohabitation the deed should become void. Marital intercourse took place on a number of occasions afterwards, but in February, 1935, the husband manifested his desire to have no more to do with his wife, and married relations were not resumed thereafter. In November, 1938, the wife petitioned for divorce on the ground of desertion :—

Held, that the acts of intercourse were evidence of a resumption of cohabitation sufficient to put an end to the deed, and that the wife was entitled to a decree nisi on the ground of desertion since February, 1935.

WIFE'S UNDEFENDED PETITION for divorce.

The parties married in 1928, the husband then being in business in Bristol. In 1932 he went to London to be trained as a professional singer. In order to secure the wife's position a deed of separation was executed in common form reciting unhappy differences and that the spouses had agreed to live separate and apart. Clause 7 provided that if they became reconciled and returned to cohabitation the deed should become void. The parties recognized, notwithstanding the terms of the deed, that the separation was temporary. The husband never made any payments to the wife under the deed in compliance with the covenants ; but for a year after the separation his mother made payments on his behalf. Marital intercourse took place on several occasions after the deed was executed, but shortly after the death of a child of the marriage in February, 1935, the husband manifested his desire to have no more to do with his wife. She presented her petition for divorce in November, 1938.

B. M. Cloutman for the petitioner.

Cur. adv. vult.

1939. April 28. HODSON J. delivered judgment as follows: This is an undefended suit for dissolution on the ground of desertion. The parties were married in 1928 and there were originally three children of the marriage, the youngest of whom was born on November 10, 1930. The parties lived together near Bristol for some years, the husband being engaged in business there. In 1932 he decided he would give up business and start a new profession which involved leaving Bristol and coming to London. There had been no really serious differences between the parties but they agreed to separate and, in order that the wife's position might be secured, a deed of separation was executed on February 1, 1932, in the usual form, reciting unhappy differences and that the parties had agreed to live separate and apart. It was provided that the husband and wife should henceforth during their joint lives live separate and apart from each other, that the wife should have the custody of the children and the husband should have access to them, and that during the joint lives of himself and the wife, if they so long lived separate from each other, the husband should pay to the wife an allowance for the maintenance of herself and the children, and finally by clause 7 that, if the husband and wife should be reconciled and return to cohabitation, the stipulations of the deed should become void. It was recognized, notwithstanding the terms of the deed, that the situation was temporary.

Very soon after the execution of the deed the parties met, the husband being in London, where he was studying for his new profession. Later on, in 1934, the wife took up work herself, thinking that would encourage her husband in his studies. The husband himself never made any payment under the deed in compliance with the covenants contained therein, but for a year after the separation payments were made on his behalf by his mother. Meanwhile the relationship between the parties was of a friendly nature and they met frequently in London and elsewhere until February, 1935. During this month Jennifer, one of the children, was ill in hospital and visited by her father on a number of occasions. On February 23 Jennifer died. The husband met the wife on that day and went back with her to the place where she was living and working. They slept together that night and marital intercourse took place. It had taken place since the separation on a number of previous occasions when the parties had met in the friendly manner to which I have referred. A week later the wife saw the husband who was still very friendly towards her. But after that she seldom saw him again and, when she did, he showed no affection for her, was not ready to do anything for her, refused her request to tell her where he was living and manifested his desire to have no more to do with her.

The petition was presented in November, 1938, more than three years after the occasion of the intercourse which took place between the parties for the last time following the death of the child. In January, 1939, during the pendency of the suit, the husband saw the wife and complained that she was asking for alimony. She said she would drop the proceedings if he would come back, but he said that he never wanted to live with her again.

I am satisfied that the wife was at all material times anxious that her husband should return to her, and the question that I have to determine is whether desertion has been established as against the husband. There is no doubt that the deed of separation of February 1, 1932, was a consensual agreement, and the question is whether it ceased to have effect by reason of the operation of clause 7, the husband having on a number of occasions down to and including February, 1935, had marital intercourse with his wife.

The fact that intercourse has taken place is not in itself conclusive evidence that a separation has come to an end so as to make the deed of no effect (see *Rowell* v. *Rowell* (1)), and the Court has to determine in a case such as the present whether there was any intention by the parties to come

(1) [1900] 1 Q. B. 9.

together again. In the words of Lord Russell of Killowen in *Rowell* v. *Rowell* (1) "If the Court comes to the conclusion "that there was an intention by both parties to come together "again there would be an end of the deed."

In contrast to *Rowell* v. *Rowell* (2), the evidence here is all in favour of the contention put forward on behalf of the wife that the deed was at an end. At the time when the last act of intercourse took place, payments had long since ceased to have been made on behalf of the husband and there is no indication that either party treated the deed as still in force. I do not hold that the acts of intercourse between the parties to which I have referred were mere casual and isolated acts, but I find that they are, in the circumstances of this case, evidence of a resumption of cohabitation sufficient to put an end to the deed, and that on the true construction of this deed events have happened which have put an end to it. I therefore hold that as from February, 1935, until the date of the institution of these proceedings the husband has deserted his wife and she is entitled to a decree nisi of dissolution on this ground.

Solicitors: *Hewitt, Woollacott & Chown.*

(1) [1900] 1 Q. B. 9, 13.

(2) Ibid. 9.

W. L.

Referred to. WHITE *v.* WHITE [1950] P. 39

Overruled. CROWTHER *v.* CROWTHER. [1951] 1 All E.R. 1131.

WILLIAMS *v.* WILLIAMS (BY HIS GUARDIAN).

C. A.

1939

July 19, 20, 28.

Divorce—Lunacy—Desertion—Respondent under restraint—Incapable of desertion after certification—Duty of magistrates—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*), *as amended by Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2.

On a wife's petition for divorce on the ground of desertion it was established that, since the original desertion and for some three years preceding the petition, the husband had been under restraint at a mental home:—

Held, that he was quite incapable of any such mental or moral activity as would show his intention to continue to desert his wife.

So held by the Court of Appeal (Sir Wilfrid Greene M.R., MacKinnon and Finlay L.JJ.)

Langton J.'s decision (ante p. 315) affirmed on this point.

Drew v. *Drew* (1888) 13 P. D. 97 distinguished.

APPEAL from Langton J. (1)

Mrs. Jane Dorothy Williams on October 6, 1924, married Mr. Thomas Herbert Williams at West Derby, Liverpool. On May 23, 1934, the wife obtained a maintenance order on the ground of her husband's desertion and wilful neglect to provide her with reasonable maintenance. He was certified on June 26, 1934, and has been under restraint ever since.

By her petition dated January 21, 1938, the wife prayed for the dissolution of her marriage on the ground that the respondent had continuously deserted her since January, 1931. By an answer filed by the husband's guardian ad litem desertion was denied, and in the alternative it was alleged that it had not continued during the three years preceding the petition.

Langton J. said that the facts established clearly that the parting between the spouses was brought about by desertion on the part of the husband. It was obvious that during the whole of the last three years immediately preceding the presentation of the petition the husband had never been in any sense a free agent, seeing that he had been a lunatic under restraint since June 26, 1934. The point taken in these proceedings by his guardian ad litem was that desertion such as would

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(1) Ante p. 315.

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constitute a matrimonial offence must be wilful and that no man who was without a mind could be said to form any intention. For the petitioner it is argued that the husband, having formed the intention to desert and done so it was possible, and in the present case just, for the Court to infer that the desertion would have continued over the statutory period of " three years immediately preceding the presentation "of the petition."

He had derived most assistance from *Jones* v. *Newtown and Llanidloes Guardians* (1), where both Lord Reading C.J. and Shearman J. held that a wife who had deserted her husband and had later become a lunatic was chargeable to her husband under the Poor Law Amendment Act, 1850, and based their decision upon the fact that the wife, being a lunatic, could not exercise any judgment and could not therefore elect to return home. *Thompson* v. *Thompson* (2) was authority that desertion, in order to constitute a matrimonial offence, must be wilful. *Drew* v. *Drew* (3) was distinguishable. The petition must be dismissed.

The petitioner appealed. The appeal was heard on July 19 and 20, and judgment given on July 28, 1939.

Leo Gradwell for the appellant. The decision in this case by Langton J. was followed in *Bennett* v. *Bennett* (4), a case where there had been a prolonged period of desertion before insanity supervened. It is contended that the true view is that the matrimonial offence of desertion is complete when once one of two spouses leaves the other wilfully and without cause, and that this desertion can only be determined by a desire to return together communicated to the deserted spouse and so sought to be acted on. How complete desertion is from the start is shown by *Frowd* v. *Frowd* (5), a case under the Summary Jurisdiction (Married Women) Act, 1895. Here the desertion continued to the end in the absence of a genuine offer to return. The desertion can continue although the

(1) [1920] 3 K. B. 381.
(2) (1858) 1 Sw. & Tr. 231.
(3) (1888) 13 P. D. 97.
(4) Ante p. 274.
(5) [1904] P. 177.

deserting spouse has been put in prison: *Drew* v. *Drew*. (1) The only case where the effect of insanity has been considered, apart from *Bennett* v. *Bennett* (2) and the present case, is *Jones* v. *Newtown and Llanidloes Guardians* (3), and so far as it goes it is against the appellant. There, however, material cases were not cited. These are *Thompson* v. *Thompson* (4) and *Townsend* v. *Townsend*. (5) The latter case has been cited as an authority against the appellant, but it shows that the essential time to take into consideration is the period when the separation of the spouses first took place, and that desertion will be presumed to continue if nothing is done by the deserting spouse to terminate it: see *Wynne* v. *Wynne* (6) and *Pratt* v. *Pratt*. (7) In the Ecclesiastical Courts a man in prison could be excommunicated for disobedience to an order for restitution of conjugal rights. In *Parker* v. *Parker* (8) it was said that after a wilful act of desertion, the state of mind was treated as continuing till a contrary intention was shown. The deserting spouse is treated as continuing to have a deserting mind. If lunacy is to determine the desertion, it follows logically that a short period of unconsciousness would have the same effect.

[He also referred to *Astrope* v. *Astrope* (9) and *Thomas* v. *Thomas*. (10)]

Roland Adams for the respondent. These proceedings are being resisted at the request of the Administration Department in Lunacy. Such cases as *Drew* v. *Drew* (1) and *Wynne* v. *Wynne* (6) are distinguishable. A man in prison still has the use of his mind to express his desire to return to his wife, but a man in a lunatic asylum has no mind of his own. It is not the incarceration but the inability to use the mind which prevents the Court from regarding the period of desertion as continuing. A lunatic is unable to commit any matrimonial offence, nor is a lunatic liable for permitting a

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(1) 13 P. D. 97.
(2) Ante p. 274.
(3) [1920] 3 K. B. 381.
(4) 1 Sw. & Tr. 231.
(5) (1873) L. R. 3 P. & M. 129.
(6) [1898] P. 18.
(7) [1939] A. C. 417; 55 Times L. R. 910.
(8) 1926 S. C. 574, 578.
(9) (1859) 29 L. J. (P. & M.) 27.
(10) [1924] P. 194.

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matrimonial offence. It was argued in *Bennett* v. *Bennett* (1) that a lunatic was incapable of terminating the period of desertion, but that view was not accepted. The point is that as the lunatic is unable to make use of his mind he cannot decide to continue the desertion and therefore it cannot be inferred by the Court that the desertion is continuing.

Leo Gradwell replied.

Cur. adv. vult.

1939. July 28. SIR WILFRID GREENE M.R. This appeal raises a novel and difficult question of far-reaching importance. The facts are stated in the judgment of Langton J., and I need not repeat them. The question of law which falls for decision depends upon the true meaning and effect of s. 2 of the Matrimonial Causes Act, 1937; and may be thus stated: Where a petition for divorce is based upon alleged desertion without cause for a period of at least three years immediately preceding its presentation, and the respondent who before the beginning of that period has deserted the petitioner is during the whole or part of the period of unsound mind and incapable of exercising volition, can the petitioner succeed? Langton J. answered this question in the negative: and, after anxious consideration, I have, with hesitation and (I may add) regret, come to the conclusion that his decision is correct.

The decided cases upon the matter of desertion do not present a very illuminating body of jurisprudence. There are, however, some matters which appear reasonably clear. The act of desertion requires two elements on the side of the deserting spouse—namely the factum of separation and the animus deserendi; and on the side of the deserted spouse one element, namely, the absence of consent. The ensuing state of desertion continues until it is terminated. Termination may take place in various ways. It may take place by the factum of return, or by a supervening animus revertendi, coupled with a bona fide approach to the deserted spouse, with a view to the resumption of life together (*Pratt* v. *Pratt* (2));

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(1) [1939] P. 274.

(2) [1939] A. C. 417.

or by a supervening consensus, for example, under a separation agreement bona fide made. It cannot, however, be terminated by a mere animus revertendi unaccompanied by some notification to the deserted spouse. It might be argued from this last proposition that, as the animus revertendi cannot by itself terminate the state of desertion, the continuance of that state cannot depend upon the continued existence of the animus deserendi, and that accordingly incapacity to have either the one animus or the other is an irrelevant consideration in determining whether the state of desertion exists during a particular period. But in my opinion such an argument is fallacious. The statements (*a*) that the mere formation of an animus revertendi does not of itself terminate the state of desertion, and (*b*) that the presence of an animus deserendi is essential for the continuance of that state, may at first sight appear to be logically incompatible. But they are not really so, since a deserting spouse who merely forms the intention to return, but takes no step to communicate it or to put it into execution, and so leaves the fact of separation unaffected, cannot be heard to say in any relevant sense that the animus deserendi no longer exists. The de facto severance of the marital relationship necessarily persists in the absence of some step directed to its restoration. The authorities cited by Langton J. appear to me to establish the necessity for the continuing existence of the animus deserendi in the sense already mentioned. In the ordinary case its existence will be inferred; but it cannot be disproved without some definite step on the part of the deserting spouse (see per Lord Romer in *Pratt* v. *Pratt* (1)). I may add to those authorities a reference to the statement of Scrutton L.J., in *Bowron* v. *Bowron* (2), where he says: "The intention is presumed to continue, "unless the husband proves genuine repentance and sincere "and reasonable attempts to get his wife back." In the case of a person of unsound mind, quite apart from the impossibility of taking any such step in fact—a matter which by itself might be disregarded as it may be in the case of a convict

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(1) [1939] A. C. 417, 423, 427. (2) [1925] P. 187, 195.

(*Drew* v. *Drew* (1))—there is, generally speaking, no capacity to have the animus necessary to take such a step, or to give to it the quality of volition required to produce a legal result.

During the course of the argument, I thought at one time that the Court might be at liberty, upon the facts of a particular case, to draw an inference as to what the conduct of the lunatic would have been, if he or she had remained of sound mind. If it were permissible to draw such an inference, the question whether in any particular case it ought to be drawn would not present any insuperable difficulty. But I do not think that this is a permissible solution. What must be proved is desertion for the necessary period. If I am right in what I have said as to the necessity for the animus deserendi and the impossibility of its existence in the case of a person who by reason of lunacy is incapable of having it, that proof can never be given. In drawing the suggested inference, the Court would be proceeding upon the basis of an assumed fact the existence of which is ex hypothesi impossible in law, namely, that the lunatic is capable of having the animus deserendi; for it would be saying that if the lunatic had been capable, he would have acted in a particular way.

The result of the conclusion to which I find myself compelled to arrive must in many cases amount to grievous hardship. It will mean, for instance, that lunacy supervening the day before the presentation of the petition, will deprive the deserted spouse of his or her chance of release under this particular clause. Instances of a similar capricious operation of the clause might be multiplied: but this is a matter which, in my opinion, can only be put right by legislation.

The judgment of Langton J. was in my opinion perfectly right and his reasoning unassailable. The appeal must accordingly be dismissed.

MacKinnon L.J. Having regard to the authorities that were cited to us, and having still more regard to the opinion of my brethren, I am not prepared to dissent from their conclusion that this appeal fails. I confess, however, that my unaided consideration of the principles involved would not lead me to the conclusion that, if a respondent is proved to have deserted the petitioner more than three years before, and has never returned, or evinced any genuine desire to return, the petitioner's right to a decree under s. 2 (*b*) of the Matrimonial Causes Act, 1937, will be barred if for any part of the three years the respondent has been certified as insane.

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(1) 13 P. D. 97.

The verb "desert" is defined by the Oxford English Dictionary thus: "(1.) To abandon, forsake, relinquish; "to depart from. (2.) To forsake . . . . a person, having moral "or legal claims on one." It is not without interest that in the illustrative quotations is a sentence of Lopes L.J.: "A husband "deserts his wife if he wilfully absents himself from her "society, in spite of her wish."

There is no doubt that, within these definitions, the husband in this case "deserted" his wife in May, 1933, nearly five years before the presentation of her petition in January, 1938. At that date he wilfully absented himself from her society, in spite of her wish. In fact, he has never rejoined her, or expressed any desire to do so.

Sect. 2 (*b*) of the Act of 1937 says: "if the respondent has "deserted the petitioner without cause for a period of at "least three years." The language is natural, but not precise. "To desert," as I have pointed out, means the act of forsaking. "To desert for three years" really means "to commit the "*act* of desertion which causes separation, and to remain in "that state of separation for three years."

There being no question that the respondent did commit the act of desertion in May, 1933, the only question must be whether he has ever since remained in the state of separation. In fact he has done so: the question must, therefore, be whether he has done so "without cause."

He deserted her nearly five years before the petition; and has never returned. It is true that for three years before the petition he was in a lunatic asylum; and, therefore, was physically prevented from returning to the wife. That physical inability to return would appear not to be a cause excusing his absence. If he had been in a prison, instead of a lunatic asylum, he could be held to have been continuing "without cause" the state created by his previous act of desertion: *Drew* v. *Drew* (1); and *Wynne* v. *Wynne.* (2)

It is said, however, that the continuance of the state of absence, originally created by his act of desertion, has not been "without cause," by reason of his mental condition. Desertion, it is said, must be wilful; and the continuance of the state of separation created by desertion must also be wilful. But as the respondent since June, 1934, has been without powers of mind or will, his continued absence, quite apart from the obstacle of his incarceration, cannot be said to be wilful.

The principle involved must, I think, be that to establish desertion without cause for three years, it must be shown that the respondent was of sane mind for every part of that period. The petitioner presenting her petition in January, 1938, would equally have failed if the man remained sane but obdurate until December, 1937, and had then been certified for one month or one week. She must equally have failed if, by reason of temporary insanity, he had been in the asylum for a week or a month in February, 1935, and had then been discharged cured. Indeed, I see no logical reason why it should not have failed if there were proof that during the three years the man had fractured his skull in an accident, and had lain for some time unconscious in hospital.

Moreover, the same principle must apply, however ancient was the original "act" of desertion, to this case that was nearly five years before the petition. But in *Bennett* v. *Bennett* (3), decided in the same way by Bucknill J., the act of desertion was thirty-five years before the date of the petition; and the respondent was only certified sixteen months before that date. The "wilfulness" of desertion suggested, if not conclusively proved, by the obstinate persistence of half a century, might be nullified by insanity during the final month of the three years, or by temporary insanity for a month at the beginning of those three years.

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(1) 13 P. D. 97.

(2) [1898] P. 18.

(3) Ante p. 274.

I gravely doubt whether a principle leading to such possible results can be correct. It is clear that the continuance in the state of desertion must be wilful. And it must be a question of fact in each case whether the continuance of the state, created by an original act of desertion, has been wilful. The mental condition of the deserter during any part of the material period must doubtless be one of the facts to be considered. I confess that, apart from authority, I should not think there was any reason why the Court, taking account of the doings of the party when sane, might not draw an inference therefrom as to what is likely to have been his attitude during the period of his insanity, if it had not occurred. In *Herod* v. *Herod* (1) the Court was held to be entitled to infer from the rest of the conduct of the respondent that, if she had known of the adultery of the petitioner, her attitude towards him would have remained unaltered. That is to infer that a fact would not have altered the respondent's conduct if she had it in mind. I do not think it is a very different thing to make such an inference, not if she had something in mind, but if she had a mind to have it in.

If, as in *Bennett* v. *Bennett* (2), the respondent had been in a state of obstinate desertion for thirty-five years, it would not, if this principle were applied, be difficult to infer that she would not have repented in the last few months. So also, if the respondent had been insane for a short period at the beginning of the three years, and after recovery had persisted in desertion for the rest of it.

In the present case the dates and times are less extreme, and it may be a nice question if any such inference should be drawn. But that is not material to the question of principle.

The authority containing the clearest statement of the proposition relied on by the respondent is *Jones* v. *Newtown and Llanidloes Guardians.* (3) I agree that the remarks of Lord Reading C.J. are very much in point. But I may observe that

(1) Ante p. 11.
(2) Ante p. 274.
(3) [1920] 3 K. B. 381.

the question in that case was whether an order for maintenance could properly be made against a husband, under s. 5 of the Poor Law Amendment Act, 1850. In fact, there is nothing whatever in that section about "desertion"; and I do not understand very well how the question of "desertion" arose.

FINLAY L.J. (read by MACKINNON L.J.). I agree with the Master of the Rolls. In my opinion Langton J. arrived at the right conclusion in this case. By s. 2 of the Act of 1937 a petition may be presented on the ground that the respondent "has deserted the petitioner without cause for a period of "at least three years immediately preceding the presentation "of the petition."

It appears that up to 1858 the only remedy for desertion was a suit for restitution of conjugal rights. It is impossible, I think, to imagine that an order for restitution could ever have been made against a lunatic.

By the Act of 1857 "desertion without cause for two years "and upwards" was made a ground for judicial separation; and, if coupled with adultery, "desertion without reasonable "excuse for two years or upwards" was made a ground for divorce. I do not know the reason for the variation of the language, but it does not seem to me to make any difference.

My view rests really upon what I conceive to be the real meaning and quality of desertion. It is not a crime, but it is a wrong. The words "matrimonial offence" do not, so far as I have observed, occur in any of the Acts; but they are used with reference to desertion in more than one judgment. There is a moral quality about desertion. It—and in this it resembles a crime—is largely a matter of intent. One man is absent from his wife for six months, but he has a "reasonable "excuse," for example, he is working in some place where she cannot well live. That is not desertion. Another man is absent for the same period intending to desert. His intention makes it desertion. It is the mind of the man—judged, of course, as mind must be by acts and statements—which has to be judged.

By the Summary Jurisdiction Acts relief may be given by a Court of Summary Jurisdiction to a wife whose husband has deserted her. I cannot conceive that a summons could be issued against a lunatic: but I do not know why not, if the present respondent has, during the three years, been deserting his wife.

I do not think there is any authority really in point. The imprisonment cases—*Drew* v. *Drew* (1) is the best example—appear at first sight to favour the appellant; but I think they are distinguishable, and exactly on the ground taken by Langton J.

The very recent decision of the House of Lords in *Pratt* v. *Pratt* (2) may perhaps now be considered the leading authority on desertion. In the speech of Lord Macmillan, clear support is to be obtained for the view which I take: see the first paragraph of the second column of p. 911, and particularly the sentence "The deserting spouse must be shewn to have "persisted in the intention to desert throughout the period." But I see nothing in the speech of Lord Romer inconsistent with my view. It is true that the wife there—having deserted—would no doubt be treated as still in the same state of mind unless she manifested some change of mind. In *Pratt* v. *Pratt* (2) the lady did manifest a changed mind and thereby, as the House of Lords held, did determine the desertion, although of course physically she remained away from her husband just the same.

But Lord Romer's reference to the "active step" seems to me to have no application at all to a lunatic who cannot take any active step, partly no doubt, because he is under physical restraint, but mainly—and this is I think the fundamental reason—because being mindless he is unable to think any thought, to form any intent, or to take any reasoned action.

My view that the desertion sub-section has reference to normal persons, and not to lunatics, is I think strengthened by the fact that lunacy is dealt with in another sub-section and, as Langton J. points out, the wife may probably, at a not very distant date, be able to take advantage of the appropriate provisions in that behalf.

(1) 13 P. D. 97.

(2) [1939] A. C. 417.

C. A.
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I agree that the judgment of Langton J. was in all respects correct and should be affirmed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Field, Roscoe & Co., for Berkson & Berkson, Birkenhead; Lightbounds, Jones & Co., for Owen, Dawson & Wynne-Evans, Liverpool.*

H. C. G.

ETTENFIELD *v.* ETTENFIELD.

1939
Feb. 23, 24, 28; *March* 1, 2; *May* 10.

Divorce—Evidence—Husband's petition on ground of adultery—Agreement for separation—Birth of child to wife—Husband's proof of non-access—Rule in Russell *v.* Russell *excluded.*

The rule in *Russell* v. *Russell* [1924] A. C. 687, which debars a spouse from giving evidence which would tend to bastardize a child born during the marriage, does not apply where the spouses have separated under an agreement, even if it is not under seal. Such an agreement invades the very special sanctity inherent in the conjugal relation, and does not differ in principle from a similar agreement embodied in a deed. Evidence by the husband of non-access is therefore admissible.

Mart v. *Mart* [1926] P. 24, approved in *Stafford* v. *Kidd* [1937] 1 K. B. 395, extended.

CROSS-PETITIONS for restitution of conjugal rights and divorce.

The marriage took place in April, 1926, at Stockport. In August, 1936, Mrs. Dorothy Margaret Ettenfield prayed for a decree for restitution of conjugal rights against her husband, Mr. William Eric Ettenfield, on the ground that he had withdrawn from cohabitation without just cause in August, 1935, and had refused to return to her. By his answer the husband pleaded just cause for leaving his wife and said that there was a valid and subsisting agreement between them to live apart into which they entered in September, 1935. By her reply the wife traversed the husband's allegations.

In a cross-petition filed in January, 1938, the husband sought the dissolution of his marriage on the ground of the wife's adultery. He relied on the birth of a child to the wife on May 26, 1937, and proof of non-access since before the separation in September, 1935. The wife by her answer denied the charge of adultery.

The material facts and arguments are set out in the judgment.

John Latey for the wife.

Lord Drogheda for the husband.

Cur. adv. vult.

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1939. May 10. LANGTON J. delivered a written judgment as follows :—

In this litigation two suits are presented to the Court. In the first the wife, represented by Mr. John Latey, asks for a decree of restitution of conjugal rights, and in the second the husband, represented by Lord Drogheda, asks for a dissolution of the marriage on the ground of his wife's adultery with a man unknown. The wife's suit was filed as long ago as August 12, 1936, and in that suit the husband pleaded just cause for leaving his wife, and secondly, the existence of a separation agreement. The husband's suit was filed on January 17, 1938, and the evidence upon which he depends is based upon the birth of a female child born on May 26, 1937. The husband contends that he parted from his wife on or about August 6, 1935, and that in the following month, September, 1935, a separation agreement was arrived at as between himself and his wife. The terms of this agreement are set out in correspondence between solicitors acting for the two parties, and according to the husband's contention the terms so arrived at have been observed by both parties. The husband and wife continued to live in the same town, but in different parts thereof, and met only rarely, and for the most part accidentally. Whilst living separated in this manner the wife on May 26, 1937, gave birth to a child.

It was clear from the outset that, if the husband could make good his contention that the child in question was the result of an adulterous association by his wife, all other matters concerned in these two suits would become of no importance, and it was accordingly agreed by counsel that this question should have precedence over the rest. Unhappily for the parties the question to be determined is literally bristling with difficulties. Mr. Ettenfield, as I have said, is unprovided with any evidence of any kind concerning his wife's adultery apart from such evidence as he might be allowed to give of non-access by himself to his wife at the material times. Mrs. Ettenfield on her part claims that the child was born in wedlock and is the result of marital relations which had taken place between the parties in the autumn of 1936. As early as

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December 4, 1936, six months before the birth of the child a letter had been written by Messrs. Woosnam & Co., the solicitors now acting for Mrs. Ettenfield, to Messrs. J. Ogden Hardicker, Hanson & Co., the solicitors for Mr. Ettenfield, claiming that the parties had met in the August of that year, and that marital relations had been resumed between them. The husband's solicitors immediately answered this letter by a flat denial that there had been any resumption of marital relations, and the matter appears to have been left there without further comment on either side, until Mrs. Ettenfield wrote to her husband on June 1, 1937, announcing the birth of the infant.

Obviously the first point to be determined is whether Mr. Ettenfield can in the circumstances be allowed to give evidence of non-access, in view of the rule laid down by the House of Lords in *Russell* v. *Russell.* (1) Such evidence cannot in the generality of cases be received from a spouse. The Courts have nevertheless recognized what may loosely be termed exceptions to the rule, but should perhaps be more correctly described as circumstances to which the rule has no application. It is not, I imagine, a matter of any doubt that, where parties have obtained a judicial separation, and are living apart by virtue of a decree properly so obtained, the rule could have no application. Indeed there is authority for the proposition that, so far from the spouses being debarred from giving evidence of non-intercourse to bastardize the child, the infant in such a case is by presumption of law illegitimate without any evidence of non-intercourse: *In the Parishes of St. George and St. Margaret, Westminster* (2) and *Hetherington* v. *Hetherington.* (3)

The question whether the rule applies in cases where the parties are living apart under a deed of separation stands on more debatable ground. Bateson J. gave a brief but exceedingly clear judgment upon this subject in the case of *Mart* v. *Mart.* (4) No appeal was taken against this decision, and it has been followed without question, and so far as I know

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(1) [1924] A. C. 687.

(2) (1790) 1 Salk. 123.

(3) (1887) 12 P. D. 112, 114.

(4) [1926] P. 24.

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without exception in this Division since that date. In the year 1935 Luxmoore L.J., then Luxmoore J., in *In re Bromage. Public Trustee* v. *Cuthbert* (1), declined to follow the decision of Bateson J. in *Mart* v. *Mart* (2) on the ground that it was in conflict with certain earlier cases of higher authority. Fortunately for me I am spared any embarrassment which I might feel in having to choose between two guides, either of whom I would be happy to follow, by the fact that a Divisional Court of the King's Bench Division in *Stafford* v. *Kidd* (3) has elected in favour of the decision of *Mart* v. *Mart.* (2) I consider that I am bound by the decision of any Divisional Court notwithstanding that the Division be not one to which I happen to belong. So far as I am concerned, therefore, I am bound to assume, following *Stafford* v. *Kidd* (3), that the rule in *Russell* v. *Russell* (4) has no application where the parties are living apart under a deed of separation.

It falls, therefore, to be considered whether the fact that the agreement to live apart was not enshrined in a deed of separation constitutes a distinction which would bring this case within the rule laid down in *Russell* v. *Russell* (4), and outside the circumstances in *Mart* v. *Mart* (2) and *Stafford* v. *Kidd.* (3) [The learned judge proceeded to deal with the question of fact whether an agreement had been arrived at between the parties to live apart, and after reviewing the evidence thereupon his Lordship concluded as follows :] With all these points in mind, I am at a loss to imagine how any one could arrive at any other conclusion upon these facts and this correspondence and the testimony of the spouses themselves than that an agreement to live apart was duly arrived at, and that the terms of that agreement have been faithfully carried out by Mr. Ettenfield.

In a case which came before me in the year 1933 of *Collis* v. *Collis and Thomas* (5) I pointed out that it would be necessary in order to raise a point concerning non-access under an oral agreement, that the agreement should be established

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(1) [1935] Ch. 605.
(2) [1926] P. 24.
(3) [1937] 1 K. B. 395.
(4) [1924] A. C. 687.
(5) Law Times Jour. vol. 175, p. 9.

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beyond doubt and question. I do not wish to depart in the slightest degree from that view. On the contrary, I would rather repeat with emphasis that agreements of this character must be most carefully scrutinized if and when it is suggested that such important consequences as are here alleged flow from them. For my own part I should always require to be satisfied beyond any doubt that a real and substantial agreement either started or confirmed a settled relationship completely different in kind to that of the customary marital cohabitation, and it is all the more essential that the existence and observance of the agreement should be beyond question where, as in the present case, the parties have continued to live in the same town and are not precluded by distance from casual meetings.

Finding, however, as I do that this agreement was both entered into and acted upon, the question of law arises for determination. So far as authority is concerned there appears to be literally no direct guidance whatever. When one remembers that the rule in *Russell* v. *Russell* (1) was only formulated in direct terms in the year 1924, it is not altogether surprising that this point should not yet be covered by authority. The nearest thing to anything approaching a statement of judicial opinion upon the point is that contained in *Rimmer* v. *Rimmer*, reported in a note to the report of *Hadlow* v. *Hadlow*. (2) Hill J., in dealing with an intervention by the King's Proctor in that case, refused to accept an admission of adultery by the wife made before justices, and afterwards retracted, as admissible in evidence before him. The judgment does not purport to give the actual words used by the learned judge, but reports him as saying that since there was no proof of an agreement to live apart, there was nothing to negative the presumption of law that the child to which the wife had given birth was the child of her husband. I am aware that this statement from Hill J. has, on more than one occasion, been put forward as showing that in his view an agreement to live apart, even though not embodied in a deed, would suffice to alter the presumption of

(1) [1924] A. C. 687. (2) (1930) 46 Times L. R. 624.

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legitimacy and thus remove the bar imposed by the rule in *Russell* v. *Russell.* (1) I should feel very relieved if I could accept this dictum of Hill J. as being the expression of his considered opinion, but it is obvious that he may just as well have been referring to an agreement by deed as to an agreement unaccompanied by a deed. I cannot, therefore, feel that I can accept this expression as a sure guide concerning his view.

In the absence of authority one is of course thrown back upon a consideration of principle. Commencing with the *Russell* v. *Russell* (1) rule itself, it is not quite easy to extract from the very full opinions in that case the exact principle upon which the rule was founded. Lengthy and repeated study of these opinions leads me to suppose that the main principle is to be found in the words used by the Lord Chancellor (2), that to hold to the contrary would be "to invade "the very special sanctity inherent in the conjugal relation." Lord Finlay also said (3): "Very good reasons could be given "for respecting the sanctity of married life in this matter, "to use the phrase employed by Lord Halsbury in a case to "which I shall have occasion to refer further on. But the "rule is absolute, and wisely so. It is not decent that husband "or wife should give evidence to bastardise the issue of the "wife during the marriage, however decorous the evidence "might be in itself." There is also the language of Lord Halsbury in the *Poulett Peerage Case* (4), language upon which the opinions were expressly founded: "as regards the rule "which I think most wisely and properly protects the sanctity "of married intercourse and permits it not to be inquired into "in any Court of Law"—see the opinion of Lord Dunedin in *Russell* v. *Russell.* (5) I am the more moved to accept this reason as the underlying principle because, if accepted, the exceptions which have been admitted to or grafted upon the rule fall into logical sequence. For example, the exception in the case of a divorce a mensa et thoro, which is as old as *In the Parishes of St. George and St. Margaret, Westminster* (1); the exception where the parties are living apart under a judicial separation: *Hetherington* v. *Hetherington* (2); and the further exception as to parties living apart under a magistrate's separation order: *Andrews* v. *Andrews and Chalmers* (3), fall into line as proper and just exceptions, since the sanctity of the conjugal relations has already been invaded, if not abolished, by judicial intervention. Upon the same lines, as it appears to me, an exception in cases in which a separation agreement has been arrived at can be justified on the ground that no very special sanctity can be claimed for a conjugal relation which the parties have agreed, so far as it lies in their power to do so, temporarily to renounce.

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(1) [1924] A. C. 687.
(2) Ibid. 698.
(3) Ibid. 706.
(4) [1903] A. C. 395.
(5) [1924] A. C. 723.

I find it difficult to perceive in what way an agreement such as the present one differs in principle from an agreement embodied in a deed. The deed in this case was only dispensed with at the instance of the wife in order to secure to her a greater freedom of action in the case of dispute arising concerning the augmentation of her husband's income. It can hardly be contended that the sanctity inherent in the conjugal relation was in any way preserved by the husband's forbearance to insist upon a formal deed. It would rather seem to me that, if I have correctly apprehended the foundation of the rule, it could and ought only to have application where the parties are in fact cohabiting (in the broad sense of the word) or where they must be taken by presumption of law, and in the absence of evidence to the contrary, to be so cohabiting. It is true that, as Lord Birkenhead points out (4): "The "rule is absolutely general in the comprehensiveness of its "expression. It has no geographical qualifications." I do not, however, take this to mean that in cases where cohabitation has ex concessis temporarily ceased either by judicial fiat, or by a legally binding consensus as to the parting, no exception could be allowed. No one pretends that there is any special magic attributable to a deed. It is a convenient method of expressing a binding agreement in solemn and

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(1) 1 Salk. 123.
(2) (1887) 12 P. D. 112.
(3) [1924] P. 255.
(4) [1924] A. C. 698.

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enduring terms. It may be and often is an agreement from which it is less easy to escape than from agreements more lightly arrived at, but it does not differ in essence nor often in result from other less solemn forms of agreement.

I cannot, therefore, see that, if it be right, as I am bound to believe it to be, to allow evidence of non-access in cases where the parties are living apart under a deed of separation, it would not be also right to admit such evidence where an agreement to live apart has been agreed upon and performed, merely because that agreement has not taken the form of a deed.

[His Lordship then dealt with the evidence and continued :] Mr. Ettenfield has convinced me that at no time after he parted from his wife in the year 1935 did he have intercourse with her.

In view of the opinion which I have reached concerning the law, this finding of fact determines the issue in Mr. Ettenfield's suit. He is accordingly entitled to a decree nisi in his suit, and any other question in issue between the parties will not, as I understand the matter, require to be further debated.

Solicitors: *Boxall & Boxall, for Woosnam & Co., Blackpool; Gregory, Rowcliffe & Co., for J. Ogden Hardicker, Hanson & Co., Manchester.*

W. L.

JOSEPH *v.* JOSEPH.

1939
June 12, 30.

Divorce—Restitution of conjugal rights—Wife's undefended petition—Wife's original desertion—Bona fide offer to return—Decree.

A wife deserted her husband. Six months later she expressed a bona fide intention to return to him. He refused to take her back. She petitioned for a decree for restitution of conjugal rights :—

Held, a spouse who was initially in the wrong in such circumstances could put himself or herself in the right by taking the proper steps, and the petitioner by making a bona fide offer to return had remedied the wrong.

Ratio decidendi in *Pratt* v. *Pratt* [1939] A. C. 417 followed.

WIFE'S UNDEFENDED SUIT for a decree for restitution of conjugal rights.

The petitioner, Mrs. Pamela Joseph, married the respondent, Mr. Leslie Zader Joseph, in September, 1933, at the New West End Synagogue, Paddington. In April, 1938, the petitioner left her husband and announced her intention not to return to him. In October, 1938, she wrote to her husband offering to go back to him. He rejected the offer. The Court required argument on the question whether the petitioner was entitled to the relief sought in view of her having left her husband without cause in the first place.

G. C. Tyndale for the petitioner. It is well established that there is always a locus poenitentiae for an errant spouse who leaves the other without just cause, provided that in good faith he or she makes an offer to resume married life within a reasonable time : see *Pratt* v. *Pratt.* (1)

1939. June 30. LANGTON J. I do not think this is a case in which I need to give an elaborate judgment. The case has caused me some hesitation because it is acknowledged that at the outset of her quarrel with her husband the wife put herself completely in the wrong. She left his house and announced her intention of not returning to him. Within

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(1) [1939] W. N. 275 ; [1939] A. C. 417.

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six months of that announcement she changed her mind and offered to return. She has satisfied me that she had a bona fide intention to return which she expressed clearly to her husband. The husband replied with a categorical refusal to have her back to live with him. I felt a little hesitant as to whether a person who had begun so much in the wrong could be entitled to a decree for restitution of conjugal rights from this Court, which can be based only on her being in the right and not in the wrong.

However, the decision of the House of Lords in *Pratt* v. *Pratt* (1) confirms me in the view that in a matter of this kind a spouse who was initially in the wrong can put himself or herself in the right by taking the proper steps. I am satisfied that the petitioner took such steps, and that by making a bona fide offer to return she remedied the wrong. She is no longer in a state of desertion, and she is only seeking her legitimate rights in asking for an order that her husband shall take her back. I therefore think that in the circumstances she is entitled to a decree, to be obeyed in fourteen days, with costs.

Solicitors: *Collins & Collins.*

W. L.

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(1) [1939] W. N. 275; [1939] A. C. 417.

ATKINS *v.* ATKINS.

1939

June 26;
July 12.

Divorce—Settlement of guilty wife's property—Husband petitioner's application for settlement of sum for payment of children's school fees—Children wards of chancery in respondent's care—Supreme Court of Judicature (*Consolidation*) *Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 191, *sub-s.* 1, *as amended by Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 10, *sub-s.* 3.

Where a husband, who had divorced his wife, sought a settlement of a sufficient part of his former wife's property to cover the cost of the school fees for the two children of the marriage, it was held that having regard to the relative means of the parties no order should be made, but that the Court had jurisdiction in a proper case to make a settlement of a divorced wife's property for the benefit of the children of the marriage, notwithstanding that they might be wards of Court.

APPLICATION by husband petitioner, for settlement of his divorced wife's property.

On May 2, 1938, the husband was granted a decree nisi for the dissolution of his marriage on the ground of his wife's desertion. The decree was made absolute in November, 1938. The petitioner applied under s. 191, sub-s. 1, of the Judicature (Consolidation) Act, 1925, as amended by s. 10, sub-s. 3, of the Matrimonial Causes Act, 1937 (1), for a settlement of such part of the respondent's property as would secure the fees of the two children of the marriage, who were wards in Chancery in their mother's care, at a boarding school. The registrar reported that having regard to the respective incomes of the parties no order should be made. The husband applied to the judge to vary the report.

Other material facts are dealt with in the judgment.

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(1) 15 & 16 Geo. 5, c. 49, s. 191, sub-s. 1, provides: "If it appears "to the court in any case in which "the court pronounces a decree "for divorce or for judicial separa-"tion by reason of the adultery "of the wife that the wife is "entitled to any property either "in possession or reversion, the "court may, if it thinks fit, order "such settlement as it thinks "reasonable to be made of the "property, or any part thereof, "for the benefit of the innocent "party, and of the children of the "marriage or any or either of "them."

1 Edw. 8 & 1 Geo. 6, s. 10, sub-s. 3, adds the grounds of divorce "desertion or cruelty" to the above sub-section.

Noel Middleton K.C. and *Roland Adams* for the petitioner.
Fearnley-Whittingstall for the respondent.

1939. July 12. HODSON J. delivered judgment as follows: This is an application made by the husband petitioner, against a wife respondent, for a settlement of her property. The parties were married in 1912 and there are two children, both girls, aged fourteen and eleven respectively. He does not ask for a settlement on himself but only on the children. On November 15, 1929, a settlement was made by the husband upon the children. This settlement produces an annual income of approximately 90*l.* On November 10, 1933, proceedings having been brought by the wife against the husband on the ground of his alleged cruelty, the petition was dismissed by Bateson J. Proceedings were instituted by the wife in the Chancery Division and on June 6, 1934, Clauson J. (as he then was) ordered that the children of the marriage should reside with and be under the care of the wife until further order, that the husband should pay to the wife 3*l.* a week to be applied towards the education and maintenance of the children except during such periods as they might be under his care, and that he should pay their proper medical and dental expenses.

This order is still subsisting. The husband states that the medical and dental expenses during the three years ending May, 1939, when he swore his last affidavit, have averaged over 100*l.* a year. The last order made against him in the Chancery Division in respect of medical expenses was dated December 19, 1938, when he was ordered to pay 43*l.* 12*s.* 6*d.* I have seen the Master's report which shows that on that occasion he complained to the Master that over a period of four years he had to pay about 150*l.* in all for dentists and doctors; this appears to be inconsistent with the figure put forward in his affidavit sworn in these proceedings. Meanwhile, on May 2, 1938, the husband obtained a decree of divorce from the wife on the ground of desertion, but no order was made on this petition affecting the care and control of the children, who are still with the wife under the order of the Chancery Court. This decree has been made absolute.

The position being as I have stated, it was somewhat startling that an application should be made by the husband against the wife that she should be ordered to make a settlement on the children who are and have been for some time past under her care and control. It was, however, sought to justify the application on these grounds. The income of the husband was said to be 750*l.* per annum derived from his occupation as a property dealer, but to be subject to a deduction of 20*l.* per month by reason of an order made by Farwell J. in December, 1937, by which he was directed to satisfy a judgment obtained by the wife against him for a total amount, including costs, of over 1800*l.* It was not contended that this payment increased the income of the wife except in so far as it restored her capital. The payment of 3*l.* per week, to which I have already referred, is also a deduction from the respondent's income.

The wife, on the other hand, has an income from investments of 364*l.* a year gross and is in receipt for the purposes of maintenance of the children of the 90*l.* a year from the settlement. It was urged on behalf of the husband, in view of the provision he had already made and of the fact that the wife had broken up the home and that she had investments, whereas he had none, that the wife should make a settlement upon the children of 100*l.* a year or less for the period of their minority or until each of them should marry at least; and it was further asked that the capital should be settled for the benefit of each of the children for their lives with resulting trusts for their issue.

The husband by his counsel stated that, the children now having arrived at boarding school age, he intended to make application to the Chancery Division with a view to the children being sent to a boarding school and also for an abatement of the order by which he was directed to pay 3*l.* a week. It was argued that under the Guardianship of Infants Act, 1925, there is power to make an order against the father for the maintenance of infants but no corresponding power to make an order against the mother and therefore the children would be unlikely, having regard to the means of the husband, to be sent to a boarding school by the Chancery judge, unless recourse could be had to the wife's money. I am unable to accept this contention.

It is quite true that the Chancery Court cannot, under the powers conferred by the Guardianship of Infants Act, order a mother to make a payment; but it seems to me plain that the Court will be in a position, if and when an application is made for any purpose in connection with the maintenance and education of these children, to take into account, not only the settlement from which the 90*l.* is derived and the additional contribution which the husband is able to make, but also the means of the wife. It seems to me that this application is in the nature of a tactical move in order to strengthen the hands of the husband in his proposed application to the Chancery Court.

Notwithstanding this, if I thought it was right in the interests of these children that I should direct the wife to settle some of her property, I should have been ready to accede to the application. But I am not so satisfied. There is no evidence that the wife is making away with her capital or is likely to do so to the detriment of the children who are under her care. I see no reason to interfere with the registrar's report, which I therefore confirm.

Solicitors: *Kenneth Brown, Baker, Baker; Chapman & Walker.*

W. L.

Applied. DANCER *v.* DANCER. [1948]
2 All E.R. 731.

CHIPCHASE *v.* CHIPCHASE.

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Husband and wife—Summary jurisdiction—Wife's summons for maintenance—Defence of no marriage—Presumption of death of former husband—Evidence—Irregular publication of banns—Marriage Act, 1823 (4 *Geo.* 4, *c.* 76), *s.* 22.

A wife, having according to her evidence neither seen nor heard of her husband since 1916, married again in 1928 on the assumption that he was dead. In 1939 she summoned her second husband on the grounds of alleged adultery, desertion and wilful neglect to maintain. The magistrates dismissed the summons, because (I.) as there was no evidence that the first husband was dead, the wife had failed to prove that her second marriage was valid; and (2.) the second marriage was not valid and subsisting, as there was no due publication of banns by reason of the wife's having wilfully given a wrong name. The wife appealed :—

Held, the case must be remitted to the magistrates to consider —(*a*) whether there was anything in the evidence to rebut the presumption that the first husband was dead, not having been heard of for over seven years; and (*b*) whether in regard to the interpretation of the words " knowingly and wilfully " in the Marriage Act, 1823, s. 22, there had been that element of intentional concealment of identity by both parties, which is essential for avoidance of the marriage.

WIFE'S APPEAL from magistrates' refusal of a maintenance order.

Mrs. Chipchase summoned her husband, Mr. Chipchase, whom she married in 1928, before the Hendon (Middlesex) magistrates for a maintenance and separation order on the several charges of adultery, desertion and wilful neglect to provide her with reasonable maintenance. She said in evidence that she had married in 1915 a man named Leetch, who deserted her soon afterwards, and she had not seen or heard of him since January, 1916. In the banns published before her marriage in 1928 to Mr. Chipchase her maiden name was used, and according to her evidence she had at least for two years before that marriage used and been known by that name. She said that before the marriage in 1928 she told Mr. Chipchase of her marriage to Mr. Leetch.

After having dismissed the summons, the magistrates gave their reasons as follows: (1.) there being no evidence that the marriage to Mr. Leetch in 1915 was not lawful or that it had been dissolved or set aside by process of law, and no evidence that Mr. Leetch was dead, the wife had failed to prove that the ceremony with Mr. Chipchase was a valid marriage; (2.) if they were mistaken in that finding, the wife had intentionally and wilfully given her wrong name for the banns, and the marriage with the defendant was not valid and subsisting, because there had been no due publication of banns. The wife appealed.

H. J. Phillimore for the appellant.
Stuart Horner for the respondent.

1939. July 21. THE PRESIDENT (SIR BOYD MERRIMAN). This is an appeal from the Hendon magistrates, who dismissed a complaint by a wife against the husband based on several charges of adultery, desertion and failure to maintain respectively, on the ground that the wife had failed to prove that there was an existing marriage. We have come to the conclusion that it is essential that this case should be re-heard by the magistrates, for we think that there are matters in connection with the two points on which they gave their decision to which they have not yet given proper or sufficient attention. I wish to say, however, that the magistrates decided this matter as one of law, and expressed their willingness on the face of their judgment to do anything that they could to help if the matter were taken to a higher Court. They have given us the benefit of a very full note and a very careful statement of their reasons, and it is only in order to help them when this matter is reconsidered that I think it necessary to go somewhat fully into the points that have arisen.

This wife had formerly been married to a man named Leetch. Without going into the details of her evidence it is quite plain that very soon after her marriage in 1915 he deserted her and, according to her evidence, she has never seen him or heard of him since January, 1916, which was within a year of her marriage. The wife having given evidence on this point and having given such evidence as she was able to give about the circumstances in which the husband left her, relied on the presumption that he was dead at the time in 1928 when she went through the ceremony of marriage with the man against whom she was bringing the present complaint as her husband.

Now the magistrates, holding that, the wife having married Leetch in 1915 and there being no evidence that the marriage was not lawful or that it has been dissolved or set aside by process of law, about which points there is no dispute, add that there is no evidence that Leetch is dead, and, therefore, they were of the opinion that the marriage with Leetch was a subsisting marriage and that the ceremony with the defendant, the respondent to this appeal, in August, 1928, did not constitute a valid and binding marriage.

I am going to deal with this point first before coming to the second point. On the face of the wife's evidence she had not heard of her husband for seven years and more at the time when she went through the ceremony of marriage with the man whom she is now charging as her husband; in fact, twelve years or thereabouts had elapsed at the time of the second ceremony of marriage. It is quite true that she was asked questions about the nature of the inquiries she had made, opportunities she had of inquiring from his relatives, and so forth, but her evidence was that she had not heard of her husband from the moment to which I have already referred, at the beginning of 1916, and had no idea whether he was dead or alive.

The magistrates have given their decision that they gave expressly on the ground that, there being no evidence that Leetch was dead, they were of opinion for that reason that the first marriage was still subsisting. It seems to me impossible to say that there was no evidence that Leetch was dead having regard to the presumption which arises in circumstances of this kind. That presumption—I am taking the statement of it from the judgment of Giffard L.J. in *Phené's Trusts* (1)—is that the law presumes a person who has not been heard of for over seven years to be dead, but in the absence of special circumstances draws no presumption from that fact as to the particular period at which he died. I need not read for present purposes the rest of the statement of the legal doctrine. Once it is shown that the wife has not heard of her husband for seven years, that presumption arises. Of course, it is not an irrebuttable presumption and it may take very little evidence to rebut it, having regard to the particular circumstances of a particular case, but, if that proposition is established affirmatively to the satisfaction of the magistrates, then it is impossible to say there is no evidence of a husband having been dead.

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(1) (1869) L. R. 5 Ch. 139.

It is in that connection, in my opinion, that the question of the nature ot any such inquiries that the wife has made arises. There is nothing in this statement of the presumption which I have quoted about reasonable belief, or inquiries, or probability of life, or any of those things to which Mr. Horner has referred us. But, of course, if a person was given ground for supposing that the other party to the marriage was alive and deliberately turned a blind eye and refused to make obvious inquiries, it might very well be that the Court would not accept as proved that the party had not been heard of for seven years. It seems to me that it is in discussing this question that the reasonableness of inquiries that have been made in regard to the circumstances of the case, whatever they may be, should be ascertained. It is in this connection that that matter is important, but once it has been established to the satisfaction of the tribunal that the party has not been heard of for seven years, then the presumption arises, although, of course, it is a presumption which can be rebutted.

In this particular case the question is whether the wife was entitled to rely on that presumption. At the time when she went through the ceremony of marriage in 1928 not merely seven but twelve years had elapsed, but it goes without saying that the magistrates have got to judge of that question as it appears to them in 1939. The wife, on the one hand, is entitled to pray in aid the lapse of yet another ten years, during which, she says, she has not heard of her husband.

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The husband, on the other hand, might be shown by some evidence, the nature of which we are unaware, but which it is suggested is in existence, actually to have been alive in 1928. In taking into account the further lapse of ten years since the ceremony of marriage in 1928 it will, no doubt, be open to the magistrates to discount that further lapse of time in connection with the non-appearance of the husband, by reason of the fact that the marriage itself did not take place in the name of Leetch but took place in the wife's maiden name. Putting it another way, there was nothing in the nature of the second marriage itself to attract the attention of the first husband if, in fact, he was alive. Those are all circumstances which the magistrates will be able to take into account.

At the end of it all, the question remains: Is it established that the husband had not been heard of for twelve years or so before the second ceremony of marriage and is there anything in the evidence to rebut the presumption that he was dead? I do not feel that that approach to the matter has been considered by the magistrates at all.

I want, before leaving this part of the case, to observe that it is very necessary to distinguish the considerations applicable to the presumption that I have been discussing and the considerations which apply to s. 8 of the Matrimonial Causes Act, 1937. Under the latter section, once the spouse has satisfied the Court that there is reasonable ground for supposing the party to be dead within the terms of the section, the marriage may be dissolved, and once the decree absolute has been pronounced it is completely irrelevant whether the party is afterwards shown to have been alive at the material time or not. That, of course, is not the case in connection with the presumption that I am now discussing, for, if it is shown that the first husband is alive, this present marriage may be declared to be null and void at any time.

In my opinion, therefore, the magistrates must re-hear the matter on the question of whether the wife had established that at the time when she went through the second marriage the husband must be presumed to have been dead. Unless there is anything which justifies them in refusing to find that the husband had not been heard of for the preceding period of twelve years or which rebuts the presumption arising therefrom that he was dead, something in effect to show that he was alive after 1928, they ought, in my opinion, to say that she has established that the marriage was valid and subsisting in so far as that point is concerned and decide the rest of the case accordingly.

Unfortunately, that is not the only question that arises. The magistrates have also decided that the second marriage was not valid and subsisting on the ground that there was no due publication of the banns. They found that the wife gave her wrong name intentionally and wilfully, and there was, therefore, no due publication and that the marriage consequently was void to all intents and purposes.

It is quite true, not having heard of her husband, as she says, for twelve years, and never having had any real home with him, that she was married in her maiden name. She says that she had disclosed to her second husband the fact that she had been married to Leetch and, therefore, so far as the knowledge of both parties of the use of the false name is concerned, that, on the face of her evidence, is established. But the question is whether the misuse of her maiden name does bring about the result that there was no due publication of banns and, therefore, nullity of the marriage to all intents and purposes. It may be that it does, but I am not satisfied on the material before us that the magistrates' minds have been directed to the real question. Evidence was given that for two years at any rate before this marriage the wife had been commonly known by her maiden name. Mr. Phillimore assures us that he has in fact got evidence which could be placed before the magistrates which carries that common use of her maiden name very much farther back than that—some seven years, I think he told us, before the ceremony of marriage.

I think it is quite clear that the magistrates have not had their minds directed to the established interpretation of s. 22 of the Marriage Act, 1823, on which this question depends.

The wording of the Act is: "Provided always that if any "person shall"—omitting the immaterial words—"knowingly "and wilfully enter into marriage without due publication "of banns or licence the marriage of such persons shall be null "and void to all intents and purposes." It is required by s. 7 that the true christian names and surname shall be given to the parson for the purpose of publication of banns. As a matter of history the cases to which our attention has been called, *Rex* v. *The Inhabitants of Tibshelf* (1), and *Rex* v. *The Inhabitants of Wroxton* (2), show quite plainly that the words "knowingly "and wilfully" were deliberately introduced into s. 22 of the Act of 1823 in order to mitigate the hardship which had arisen under the earlier Act and was exemplified by the case of *Rex* v. *The Inhabitants of Tibshelf* (1), namely, that it was quite immaterial whether the falsity in the declaration had arisen by accident or design and whether such design were fraudulent or not.

I am content for the purposes of directing the minds of the magistrates to the points they have to decide to call attention to the fact that in *Rex* v. *The Inhabitants of Wroxton* (2) Denman C.J. cited with approval the case of *Wiltshire* v. *Prince* (3), decided in the Ecclesiastical Courts after the Act of 1823 had been passed, in which Dr. Lushington expressly founded his judgment of nullity on the fact that both the man and woman were aware that banns had been published in a manner calculated to conceal the identity of one of the parties. The same appears even more clearly in the judgment of Sir Jenner Fust in *Orme* v. *Holloway* (4), where he says the construction of this Act is that, in order to set aside a marriage on the ground of undue publication of banns, it is necessary for both the parties to be cognisant of the fraud; it is necessary first to prove that there has been a fraud and, secondly, that both parties were cognisant of the fraud and knowingly and wilfully entering into the marriage without due publication of banns.

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(1) (1830) 1 B. & Ad. 190.

(2) (1833) 4 B. & Ad. 640.

(3) (1830) 3 Hagg. Ecc. 332.

(4) (1847) 5 Notes of Cas. Ecc. & Mat. 267, 271.

The other authorities, to which our attention has been called, such as, for example, *Midgley* (*falsely called Wood*) v. *Wood* (1) are to the same effect. The object of this Act was to prevent clandestine marriages; there must be an element of intentional concealment of identity before it can be said that the marriage is void for undue publication of banns.

I do not think that that element of the matter has been sufficiently considered by the magistrates. It is quite true that the case of *Small* v. *Small* (2) was cited. In that case, unquestionably, there was the element of deliberate concealment and the motive was quite plain. It may be, of course, that this is such another case but, at any rate, the wife must have the opportunity of establishing, as her counsel says she is able to establish, that the name in which she was married was the name by which for years she had been commonly known and that there was no intention to conceal her identity in the circumstances of this particular case.

I have dealt with the two points separately, but, of course, there is a certain amount of connection between the two issues with which the magistrates have to deal. The more successful the wife is in proving that her husband had completely disappeared beyond her ken the more likelihood there is, after the short history of the earlier marriage in 1915, of her reverting, and reverting notoriously, to her maiden name. If it is established to the satisfaction of the magistrates that her maiden name was the name by which she was commonly known, which she was using amongst her friends and acquaintances, there would be the strongest possible evidence that it was not used for the purposes of concealment. The more completely the magistrates are satisfied that the husband has disappeared the less is it likely that it would be used for the express purpose of concealing the particular marriage from him and his relations. However, these are all matters which will have to be considered by the magistrates, but considered from the point of view from which they have not hitherto been considered. If, of course, they come to the conclusion that the wife has established that there is a subsisting marriage, it will then be for them to deal with the merits of the case which have not hitherto been fully before them.

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(1) (1859) 30 L. J. (P. M. & A.) 57.

(2) (1923) 67 S. J. 277.

HENN COLLINS J. I am of the same opinion.

The present appellant, the wife, took out summonses against the present respondent, her husband, which were grounded on the facts that he was the husband. His answer was made by him or on his behalf: "I am not your husband," and he based that contention on two grounds. The first that at the time when he went through a ceremony of marriage in 1928 with the present appellant she was a married woman, the wife of a living husband. The second point on which he attacked his own marriage was that it had been celebrated without due publication of banns. As to the first question, namely, whether at the time of the marriage in 1928 the present appellant had a living husband, her answer to that attack was: "I have not heard of the man that I married "in 1915 since the year 1916 or thereabouts, a lapse of more "than seven years, and I was entitled in 1928 to the presumption of law in my favour that my husband had died, "and I can show that that presumption has not since been "rebutted, down to the year 1939, when these proceedings "were heard, because in that time no sign of him has been "forthcoming."

Upon that matter we have the careful statement of the magistrates of the reasons for their contention. They have held that in those circumstances they have no evidence that William James Leetch is dead. That appears to have been a wrong approach to the matter. As soon as it was established, if it was established in fact, that the former husband, William James Leetch, had not been heard of for seven years, then undoubtedly there was evidence for their consideration that he was dead, and it was more than evidence because it was a presumption and conclusive evidence until rebutted by evidence which showed, in fact, that he was alive. I am not for one moment going to trespass on the question of fact which is still for their determination, namely, whether she is or not entitled to the benefit of that presumption, but because

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I feel that their approach is the wrong one I think it ought to go back to them for reconsideration of the whole matter.

As to the second point, namely, the undue publication of banns, the matter seems to me to rest thus: the magistrates seem to me to have thought that the fact that a party to a marriage knowingly and wilfully, in the sense of "consciously," used a name to which she or he is not by law entitled is conclusive of the matter. Again I think that is a wrong approach. I think the real question has been accurately propounded in *Wiltshire* v. *Prince* (1), in which Dr. Lushington founded his judgment on the fact that both the man and woman were aware that the banns had been published in a manner calculated to conceal the identity of one of the parties. I think the word "calculated" in that connection taken along with the words "knowingly and wilfully" is used in the sense of design to conceal the identity of the parties and, therefore, it will be for these magistrates to consider what I feel certain they have not had brought to their attention, the question whether in giving her original maiden name, as the present appellant did, she intended wilfully to conceal her identity. That is a matter on which I form no opinion at all on the evidence; it is entirely for the magistrates and it should go back to them, I think, on that ground also. I think my Lord has expressed himself conclusively about it; the question for decision ought really to be whether both spouses intended that her identity should be concealed.

Case remitted to magistrates.

Solicitors: *Wingfields, Halse & Trustram; Edgar H. Hiscocks.*

W. L.

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(1) 3 Hagg. Ecc. 332.

MILBANK *v.* MILBANK.

1939
June 21;
July 27.

Divorce—Desertion—Collusive agreement for a divorce—Collusive petition dismissed—Subsequent petition on ground of desertion—Three years' period broken—Supreme Court of Judicature (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*), *as amended by Matrimonial Causes Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2.

A wife, married in 1922, deserted her husband, and, as the result of a collusive agreement between them, prayed for divorce in April, 1936, on the ground of the husband's alleged adultery. After a preliminary hearing in February, 1937, the wife had the petition dismissed in April, 1937, on the ground that it had been presented in collusion. In August, 1938, the husband petitioned for divorce on the ground of desertion for three years immediately preceding the presentation of his petition :—

Held, that during the twelve months that the collusive petition was on the file of the Court, the wife could not be said to be deserting the husband without cause.

Stevenson v. *Stevenson* [1911] P. 191, approved in *Cohen* v. *Cohen* [1939] W. N. 199, followed.

HUSBAND'S UNDEFENDED PETITION for divorce.

Mr. Sidney Alexander Milbank, the petitioner, was married to the respondent Mrs. Agnes Roleston Milbank, on July 25, 1922, at Bishops Stortford, Hertfordshire. Mrs. Milbank left her husband in 1929 and they never resumed cohabitation. In April, 1936, the wife filed a petition for divorce on the ground of the husband's alleged adultery at a London hotel with a woman unknown. He did not defend the petition, and when the case came on for hearing before the President in February, 1937, his Lordship directed that the papers be sent to the King's Proctor on suspicion of collusion. On April 28, 1937, the petition was dismissed on the wife's application.

In August, 1938, the husband presented his petition for divorce on the ground that his wife had deserted him without cause for at least three years immediately preceding the presentation of the petition. In June, 1939, the President adjourned the case for the assistance of the King's Proctor.

The material facts and arguments are reviewed in the judgment.

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Hon. Victor Russell for the petitioner.
Theodore Turner for the King's Proctor.

1939. July 27. THE PRESIDENT (SIR BOYD MERRIMAN). This is a husband's petition for divorce on the ground that, for three years preceding the presentation on August 26, 1938, of the petition, his wife had deserted him.

The case raises a novel and somewhat difficult point, and, had it not been for the fact that it is very desirable that the matter should be disposed of before the end of these sittings, I should have been glad of an opportunity to put my reasons into writing. As I have come to a perfectly definite conclusion on the matter, I do not think that I would be justified in throwing the case over for that purpose. I shall, therefore, do my best to express the reasons for my decision forthwith.

The parties were married on July 25, 1922. On April 18, 1929, the wife left home and went to South Africa on the pretext of going for a holiday, but, without going into unnecessary detail, the subsequent history has made it perfectly plain that at the time when she left home she intended to desert her husband. I have no doubt whatever about that. I have heard his evidence about it, I have read the correspondence, and Mr. Turner, who is now appearing for the King's Proctor, tells me that all the inquiries which the King's Proctor has made tend to confirm the husband's evidence in that respect. So far as the wife is concerned, I have no doubt that thenceforward, as she has said more than once in writing, she had no intention whatever, if she could help it, of setting up home with her husband again.

It goes without saying that under the Matrimonial Causes Act, 1937, the husband is obliged not merely to prove that his wife was guilty of desertion in the inception, but that she was in desertion during the three years immediately preceding the presentation of the petition. It is in that connection that this difficulty arises. On April 14, 1936, the wife presented a petition for dissolution on the ground of the husband's adultery. That petition was first served on the husband on May 20, 1936. There were two subsequent amendments with which I need not deal in detail, except to observe in passing that one was to correct the date of the alleged adultery, which was originally charged as being committed on November 9, 1934, and was subsequently amended to allege adultery committed on March 9, 1935. I mention that in passing because, when I come to deal with the circumstances in which that petition was presented, it remains unexplained and unexplainable how any allegation of adultery in connection with November 9, 1934, ever came to be made at all.

However, that petition, having been served on May 20, 1936, came in its amended form before me as an undefended cause on February 8, 1937. There were circumstances about the presentation of the case which left me in the gravest possible doubt, which I need now only say were admitted to be amply justified, whether there was any substance in the case whatever. I had better say in passing, because this is not a case in which I intend to mince my words at all, that one of the things which caused me the very gravest disquietude about that case was the evidence of a partner in the firm acting for the wife who gave evidence before me of a kind that I did not regard as very convincing. However, I adjourned the case, referring the papers to the King's Proctor for investigation. The result of that was that on April 28, 1937, the suit was dismissed on the wife's own application on the ground that it had been presented in collusion.

The present petition, as I have already stated, was dated August 26, 1938. From this statement of the dates it follows, assuming, as I have already found, that the wife had deserted the husband and remained, as I think, in a state of desertion—at any rate until negotiations for this collusive petition began—and assuming, as I am willing to assume, that after the petition was dismissed, she remained still in a state of desertion, that the husband cannot complete the period necessary to establish his case—that he has been deserted for three years immediately preceding the presentation of the petition—without counting the whole time during which the petition, subsequently dismissed on the grounds of collusion, was upon the file of the Court. To be precise, the date April 14, 1936, on which the petition was filed was well within the three years, and that petition remained on the file of the Court for rather over one year before it was dismissed.

Accordingly Mr. Russell, in opening this petition, with his customary frankness, called my attention to these dates before calling his evidence and indicated precisely wherein the difficulty in this case lay. With his assent (although I take, of course, the full responsibility for the course taken) I adjourned the case then and there without hearing the evidence of the petitioner in order that I might obtain the assistance of the King's Proctor, not merely on such law as might be involved after the facts had been ascertained, but also on the elucidation of the facts themselves in so far as they affected the question whether the period of desertion could run during the time when these admittedly collusive proceedings were upon the file. The result is that to-day's hearing has taken place with the advantage of my having the assistance of Mr. Turner for the King's Proctor both on the question of fact and on the question of law.

About the question of fact there is now no doubt whatever, but as I think that a precise statement of the facts may assist, and, indeed, is essential, to an appreciation of the point of law that emerges, I propose to deal with the facts as they are now admitted by the husband, first of all. I am not going to read the earlier letters in the correspondence because, as I have already said, I am satisfied beyond any doubt whatever that the intention of the wife when she went to South Africa was—and a long time thereafter remained—an intention to desert her husband. But the difficulties begin with proposals which were put forward by the husband in the year 1933. Again I do not propose to read the letters, having regard to the husband's perfectly frank admission as to what the purport of the transaction was. It was perfectly plain by June, 1933, when correspondence was passing between the parties, that he had told his wife that he desired to get married again; that he would do anything reasonable for her, although he was not prepared to go the length of assenting to the somewhat exorbitant terms which she herself had put forward, provided

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that she was prepared in some way or another to facilitate their obtaining their freedom.

On November 8, 1933, a letter was written by the wife in which she says that she is sorry the divorce affair is going to be so expensive in England and saying that, should the proposed Bill—which even then it was contemplated might be introduced into Parliament—fail, she was willing to forego half the sum that he had mentioned to her in order that he should make some use of the law to effect his relief. There is a short silence in the correspondence, but the gap is filled by para. 8 of the discretion statement which is put in by the husband. At some date in 1934, which has not been precisely ascertained, because I have not seen the actual letters, he received an invitation from the firm of Messrs. Tredgold and Idris, who were instructed to ask for his wife to call upon them. Mr. Idris gave evidence before me on the hearing of the wife's petition. In effect, without going into unnecessary detail, it was proposed to the husband that if he was so anxious for a divorce, as the previous letters had shown, he should provide the necessary evidence.

The husband's version of the matter, which I accept in every detail—he gave me perfectly candid evidence—was that he told the solicitor that all his life he had led a perfectly good life and he loathed the idea of anything connected with adultery, but if it would help the case he would very unwillingly provide the evidence. He was asked how the expense would be provided for and he undertook to pay all the costs. Then Mr. Idris asked if he had a solicitor. The husband had not, so Mr. Idris suggested the name of Messrs. Isadore Goldman and Co. who would act for him in those proceedings. The husband went to this firm and instructed the solicitors to do whatever was necessary, and put himself, as he phrases it, entirely in their hands. He told Mr. Turner that from the time it was realized in 1933 that the divorce would have to be in England he was prepared to commit adultery, or to appear to do so, in order to get his freedom, and that he had probably told his wife this. When he found he could not get the divorce in South Africa, he had probably told his wife that he was ready

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to be divorced in England but it would be expensive, and he was accordingly not surprised at being sent for by Messrs. Tredgold and Idris. Indeed, he said, it was the only way to get anything done; "It was I who wanted the divorce; she was "indifferent. It was I who brought the proceedings about; "my wife was bringing the proceedings because I wanted her "to do so."

He added in answer to a question by myself that before he left Messrs. Tredgold and Idris's office it had been agreed (1.) that he should provide the necessary evidence; (2.) that he should go to the solicitor suggested by Mr. Idris in order to get the matter through smoothly; and (3.) that he should pay all the costs. Everything, he added, that happened afterwards was done in accordance with that agreement. What happened afterwards was that it took him—and it is very much to his credit that he has said this, and I believe him—a very long time to overcome his almost unconquerable loathing of the procedure to which he was subjecting himself. However, eventually he brought himself to that point and arranged to spend a week-end at the hotel with a woman whom he had picked up for the purpose. He telephoned to his solicitor when he was expecting to be there, his solicitor in turn telephoned or informed the wife's solicitors, and the enquiry agents were duly at that hotel ready to give the necessary evidence. It is not a matter of speculation now. This is how the matter presented itself to me at the time when I heard the previous case, but there is no longer any question of speculation about it; these are the admitted facts.

If ever there was a case which comes exactly within the words of Lord Stowell in *Crewe* v. *Crewe* (1), this is the case. "Collusion," said Lord Stowell, "may exist without con-"nivance, but connivance is (generally) collusion for a particular "purpose. Collusion, as applied to this subject, is an agree-"ment between the parties for one to commit, or appear to "commit, a fact of adultery, in order that the other may "obtain a remedy at law as for a real injury. Real injury

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(1) (1800) 3 Hagg. Ecc. 123, 129.

"there is none where there is a common agreement between "the parties to effect their object by fraud in a court of "justice." I said I was not going to mince words about this matter and I have seen no reason whatever to disguise or conceal the name of the two solicitors who lent themselves to this procedure. It is quite plain that both must have known perfectly well what was going on and it is a thoroughly disgraceful business. I need only add that the solicitors who are now engaged in presenting the husband's case had nothing whatever to do with that matter.

It is quite clear on this statement of the facts that it is impossible to escape the conclusion that, for at least the whole of the period between the filing of that petition and the hearing before me, the wife's petition was not merely presented but prosecuted in collusion, and it is with that case only that I am dealing. I say that advisedly, because in the course of the argument it became quite plain, and I am not expressing any opinion about such a case, that it is possible, at any rate, that quite different considerations might apply if, for example, a petition innocently presented was, after the material date, prosecuted in collusion. Here, at any rate, it is undisputed and, indeed, indisputable that between April 4, 1936, and February 8, 1937, at least, the parties, these spouses jointly, were engaged in presenting a collusive petition of the kind I have just described by reference to Lord Stowell's definition, and were both actively engaged in prosecuting that petition in fraud of the Court and by mutual agreement. I say "at least "during that period" because I have said sufficient about the earlier correspondence to make it clear that the collusion did not originate merely with the presentation of the petition. It had been contemplated and was maturing for a considerably longer period. It is unnecessary to go into detail on that point because the period to which I have alluded is all within the material three years.

The question of law which emerges from this statement of facts is whether it is possible for the husband to assert that during that period his wife was deserting him without cause. It is quite clear that, if the husband himself had presented that

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petition, it would be impossible for him to assert that during its continuance on the file of the Court his wife's absence continued to have the quality of desertion. That is established by the decision of the Court of Appeal in *Stevenson* v. *Stevenson* (1), where, delivering the judgment of the Court, Sir H. H. Cozens Hardy stated: "The presentation of the "petition"—in that case after eighteen months of desertion—"and its continuance on the file of the Court prevented subsequent desertion from being without excuse. She was "praying the Court to require her husband to keep away."

But the collusive petition was not presented by the present petitioner, the husband; it was presented by the deserting wife. If that petition, unsuccessful as it turned out to be, had been presented by the wife in invitum, the husband would not have been precluded on its dismissal from counting the period during which that petition was on the file of the Court as part of the necessary three years period. As I understand the law which was declared by Hodson J. in *Chapman* v. *Chapman* (2), leaving out the very peculiar circumstances of that case, which for the present purposes are immaterial, it is as follows: The deserted spouse, against whom such an unsuccessful petition is brought, may cross-charge desertion, and is not precluded from counting the period between the presentation of the petition and the presentation of the cross-charge by the fact that there was on the file of the Court a petition, the effect of which, no doubt, for the time being would be that the deserting wife could have got an order preventing her husband from attempting to resume cohabitation. The case also goes further in deciding that, though it may be necessary to institute further proceedings on the part of the deserted spouse to establish his or her rights, the interval between the presentation of the first cross-charge and any subsequent cross-charge is immaterial, having regard to the fact that the original proceedings all the time were being prosecuted by the deserter on his or her own initiative. It goes without saying that, there being no obligation on a party to recriminate or make cross-charges, if the first petition is unsuccessful and is disposed of, the deserted spouse could bring subsequently proceedings for desertion to which the period during which that petition was on the file would establish no bar at all. It really comes to this, therefore; this being neither the case of a deserting spouse having barred himself by presenting a petition during the crucial time and leaving it on the file of the Court, nor the case in which the deserting spouse has brought a petition in invitum against the deserted spouse, under what heading does this case fall? And it is that, and nothing but that, which I propose to decide.

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(1) [1911] P. 191, 194.

(2) [1938] P. 93.

It has been admitted in the plainest and most categorical terms in this case that the wife's petition was instituted and prosecuted at the husband's instance, by his procurement, by his agreement, at his expense agreed to in advance, and that every single thing which was done in order to enable his wife to get a divorce "as for a real injury," to quote Lord Stowell again, was done by agreement between the parties that the husband should "commit or appear to commit a fact of adultery." He has told me, and I believe him, that, in fact, no adultery was committed at all, for reasons which he has given. But that refinement, if I may so term it, is unnecessary having regard to his admission about the arrangements which were made. I think that the point of the decision in *Stevenson* v. *Stevenson* (1), followed as it has been recently by the Court of Appeal in *Cohen* v. *Cohen* (2) is that, whatever may be the continuing intention of the deserting spouse, the deserted spouse is precluded from saying that a state of desertion continues while he or she is praying the Court, by proceedings initiated by him or her, to require the other spouse to keep away. That was the effect of the wife's proceedings which, as I have said, would be no handicap to the husband if he had no part or lot in them. But they were brought about by his procurement, by his agreement in the fullest sense of the word, and it seems to me to be impossible in law without ignoring the decision of the Court of Appeal in *Stevenson* v. *Stevenson* (1) —and, I may add, ignoring the various cases of desertion under the Matrimonial Causes Act, 1937, in which judges of

(1) [1911] P. 191.

(2) [1939] W. N. 199.

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this division, including myself, have followed and applied *Stevenson* v. *Stevenson* (1)—to allow this husband to say that the twelve months, during the time which this collusive petition was being actively prosecuted, was a period during which his wife was deserting him without cause. He was paying her to pray the Court to require him to keep away.

In these circumstances I cannot hold as a matter of law that the husband has established that which he is bound to prove, namely, that his wife has deserted him without cause for the period of at least three years immediately preceding the presentation of the petition.

It is a most unfortunate case. The correspondence shows clearly that this husband was waiting with eager anticipation for the passing of the Act—even as long ago as 1933—which, if he had been content to wait for it, would long ago have given him his freedom. But he chose, however reluctantly, but quite deliberately, to embark upon this conspiracy—that is the plain English of it—to impose a fraud on the Court, and I am afraid he must take the consequences of what I am convinced is the legal result of that unfortunate decision on his part.

The petition will be dismissed.

Solicitors: *Gedge, Fiske & Co.; the King's Proctor.*

(1) [1911] P. 191.

W. L.

KELNER *v.* KELNER.

1939
May 4, 10;
July 27.

Divorce—Wife's petition—Jewish dowry—Lodged in bank in joint names of spouses—Wife's claim to balance—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

Where on a marriage between Jews a sum of money was deposited, according to Jewish custom, in a bank by the wife's father in the joint names of the spouses and the marriage was dissolved thereafter on the wife's petition, the wife applied under s. 17 of the Married Women's Property Act, 1882, for the balance of the money in the account at the bank to be paid out to her as her property :—

Held, the deposit was a gift to the parties jointly, and each was entitled to half the balance remaining.

Joseph v. *Joseph* [1909] P. 217 distinguished.

WIFE'S APPLICATION for return of property.

The marriage took place on January 15, 1933, at the South Hackney Synagogue. The wife was granted a decree nisi for the dissolution of her marriage, on the ground of the husband's desertion, on June 20, 1938. The petitioner applied by summons in December, 1938, for an inquiry under s. 17 of the Married Women's Property Act, 1882 (1), into the question whether certain moneys in a bank were the property of herself or of herself and her husband. She claimed that the balance of a sum of money paid into a bank by her father by way of dowry in the joint names of herself and her husband should be paid to her.

The Registrar reported in March, 1939, that the wife's father had deposited 1000*l.* in a bank in the joint names of himself, the petitioner, and the respondent, which was to become the joint property of the two latter on the marriage taking place, and was to be handed back to the father if the marriage did not take place. After the marriage the father withdrew his name from the account. It was decided by the Registrar that the money was a gift to the parties jointly and that the respondent was entitled to half the balance remaining, namely, half of 593*l.*

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(1) 45 & 46 Vict. c. 75, s. 17, provides that in any question between husband and wife as to the title to or possession of property, either party may apply by summons to any judge of the High Court to make such order with respect to the property in dispute as the Court shall think fit.

Acton Pile for the petitioner. On the authority of *Joseph* v. *Joseph* (1) the petitioner is entitled to the whole of the balance.

Roland Adams for the respondent per contra.

1939. July 27. THE PRESIDENT (SIR BOYD MERRIMAN). This is an appeal from a decision of Mr. Registrar Long under s. 17 of the Married Women's Property Act whereby he decided that on the dissolution of the marriage on the ground of the husband's desertion the husband was entitled under that Act to a finding that half the sum of 593*l.* odd standing in joint names of himself and his wife must be paid to him.

The appeal came before me on May 10 last and it was then argued that the Registrar was wrong in not holding that the case was covered by the authority of *Joseph* v. *Joseph* (1), and that there was no such absolute control by the husband over the fund standing in joint names as would create a gift, and in failing to realize that the Court had power to do what Mr. Acton Pile was pleased to call justice. I emphasize that this is and remains an application under the Married Women's Property Act, s. 17. Under that Act, after whatever inquiries the Court may think it necessary to make, the question remains: Whose property is this? Is it the husband's, or is it the wife's, or does it belong to them both jointly?

It differs by the whole breadth of heaven from the procedure for variation of settlements which can be invoked on dissolution of marriage. That procedure assumes that certain sums belong to one spouse or the other and that they are settled in a particular way, and invokes the peculiar jurisdiction of this Court to alter the disposition and settlement of the property.

Now this is the case of a Jewish marriage in which, in accordance with custom, money was provided by the wife's father, as it was in this case, by way of dowry. The Registrar states that the arrangement was that the money was to be placed in the joint names of the father, the husband and the wife before marriage upon the terms that it was to become the property of the husband and the wife on the marriage taking

(1) [1909] P. 217.

place before a specified date, or otherwise to be handed back to the wife's father.

The Registrar has found that it was an undisputed fact that, if the marriage took place by the agreed date, the money was to be the property of the wife and the husband. The marriage did take place by the appointed date, whereupon the father withdrew his name from the account, leaving it entirely at the disposition of the spouses. Though perhaps it is unnecessary to go into the details with which I have been provided, it was in fact used by the husband, who was able to draw largely on the account for the purposes which, though primarily his, were no doubt also directly for the benefit of the spouses jointly. Five years later the marriage was dissolved, leaving, as I have said, a balance of some 593*l*. odd in the account; the figure is not a final figure, because interest may have to be added to it.

In those circumstances, is the wife entitled to the whole of that money, or are they each entitled to half of it? The Registrar has found that there is no escape from holding that each is entitled to half. In the course of the argument on May 10 it became abundantly clear that the Registrar was right and that there was no escape from this conclusion. I suggested that there might be another way of giving effect to Mr. Pile's suggestion that justice should be done and that was to invoke the procedure for variation of settlement. Under what I gather he now regards as judicial duress, Mr. Adams accepted the view that this was a settlement which could be dealt with; he made some even more damaging admissions, but nobody is bound by a mistaken admission on a point of law, if indeed it was mistaken. That I am not called upon to decide one way or the other, because Mr. Pile, after Mr. Adams had withdrawn his admissions, disclaimed categorically any desire to put forward a claim, or to get an adjournment to enable him to put forward a claim, for variation of settlement, but asked me to allow him to stand on his original application under s. 17 of the Married Women's Property Act, and that is the only point which I am deciding.

It is perfectly clear on the Registrar's findings that there

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was no other conclusion to which he could possibly come. The suggestion that he was bound to find the other way on the authority of *Joseph* v. *Joseph* (1) is based on a complete misconception of what that case decided. The whole point of *Joseph* v. *Joseph* (1)—although there is no elaborate judgment by Lord Mersey—as appears on the Registrar's report, is this: 400*l.*, the sum in dispute in that case, had been provided by the wife's relatives as joint property. So far the case resembles the present case, but it differs from the present case in that the marriage had been annulled, and in those circumstances the Registrar in that case held that law or equity, or both combined, required that the money should be handed back to the wife, the purpose for which it was provided having failed, and failed ab initio. But, as appears on the face of the Registrar's report, had the marriage subsisted, the money would have been and continued to be joint property.

That is precisely what the Registrar has found is the effect of the corresponding arrangement in the present case. I think he was entirely right and that there is no escape from this conclusion and that this appeal must be dismissed as hopeless. I need express no opinion, as I am no longer asked to do so, on the propriety or otherwise, if this arrangement was a settlement, of varying it in accordance with what are the obvious dictates of common sense.

His Lordship confirmed the Registrar's report.

Solicitors: *Edward Fail; William Daybell.*

W. L.

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(1) [1909] P. 217.

tum of HENN COLLINS, J., at p.
, not approved. SQUIRE v. SQUIRE.
48] 2 All E.R. 51.

Distinguished. SQUIRE v. S. [1949] P. 51

Approved. WHITE v. WHITE [1950] P. 39

ASTLE *v.* ASTLE (BY HIS GUARDIAN).

1939
July 28.

Divorce—Wife's petition on ground of cruelty—Defence of insanity—Intention or malignity an essential ingredient—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 176 (*c*), *as amended by Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2.

Intention or malignity is an essential element in the matrimonial offence of cruelty, and there can be no such cruelty if the accused spouse's state of mind is such that he does not know the nature and quality of his acts.

WIFE'S PETITION for divorce on the ground of cruelty.

Mrs. Marian Astle prayed for the dissolution of her marriage on the ground that her husband, Mr. Percy Lennox Vernon Astle, had been guilty of certain acts of cruelty to her in the summer of 1927 and on one occasion in March, 1931.

The marriage took place on April 12, 1927. It was established that in that year the respondent committed a series of violent assaults on his wife. In June, 1927, he was certified as insane, and in October, 1927, he was discharged. His wife did not live with him owing to her fear of him. In March, 1931, when not under certification, he came to the wife's house and threatened violence to her and her family. She sought police protection. In October, 1937, he was again certified and had been under restraint ever since.

The respondent, by his guardian ad litem, the Official Solicitor, denied the charges of cruelty, and said, in the alternative, that, if he committed any of the acts alleged, he was at all material times of unsound mind and incapable of understanding the nature and quality of his acts.

Roland Adams for the petitioner.

Theodore Turner for the respondent.

Cur. adv. vult.

1939. July 28. HENN COLLINS J. delivered a written judgment as follows:—

This is a wife's petition for dissolution on the ground of cruelty. The answer puts in issue the allegations of cruelty, and, by amendment for which I gave leave, alleges that, at the time the acts of cruelty, if any, were committed, the respondent was of unsound mind and did not know the nature and quality of the acts he was committing.

The parties had lived together as man and wife for some three weeks only when the respondent began a series of violent, even murderous, assaults upon his wife (and, incidentally, upon others). On June 16, 1927, the respondent was certified as insane and received into Cheadle Mental Hospital, suffering from acute mania. There he improved and he was allowed out upon parole from time to time, and on one of these occasions told his wife that he had decided to kill her and to commit suicide. The petitioner was, or course, terribly alarmed, but, with great presence of mind, pretended to agree with him, and eventually persuaded him to go back to the hospital. From that institution he was discharged on October 6, 1927, but his wife did not live with him, as she was afraid to do so.

In March, 1931, while he was at liberty, and not under certificate, he came to the house in which the wife was living and uttered threats of violence to his wife and her family, which, in view of her past experience, caused the wife such real apprehension that she sought police protection. In October, 1937, the respondent was again certified, and has been under restraint ever since.

In those circumstances it was naturally conceded that the wife had been the victim of cruelty, if cruelty is to be judged only from the point of view of the one who suffers from the acts complained of. But, if, on the other hand, intention on the part of the actor is a necessary element of cruelty in a matrimonial suit, there would be no cruelty if the state of the respondent's mind was such that he did not know the nature and quality of his acts. Since I have come to the conclusion upon the facts that the respondent did not, by reason of disease of the mind, know at the time he was committing them the nature and quality of the acts which he committed in 1927, I have to decide which of these two contentions is right in respect of those acts.

The point is, it seems, uncovered by direct authority, not only as the law stood before the Matrimonial Causes Act, 1937, but also, if that Act affects the matter, as the law now stands; and in deciding it, as this case requires that I should, I am aware that I am travelling (not too rapidly, I hope), where Sir Charles Butt, I will not say feared to tread, but would not tread in the case of *Hanbury* v. *Hanbury*. (1)

The argument in favour of the view that a petitioner is entitled to relief in this Court on the ground of cruelty although the acts complained of were the outcome of insanity, runs thus: None of the accepted tests of cruelty in matrimonial causes takes account of anything but the effects upon the victim, or indicates that the acts must be knowingly and wilfully done. This is only to be expected (the argument runs) because the cases show that the primary, if not the only, ground upon which the Court intervened in a case of cruelty was the protection of the injured spouse. If from the disposition and the circumstances of the respondent the petitioner was likely again to be exposed to similar treatment unless the spouses were judicially separated, a separation was decreed without inquiring whether the respondent's actions proceeded from malignity or other cause. Hence it came about that, if the respondent's actions were caused by recurrent fits of insanity, with intervals during which there would be no excuse for non-cohabitation, a decree would be granted; but, if the insanity were such as to require permanent restraint, then and then only, would a decree be refused, the lunacy laws being assumed to afford a sufficient protection.

That is, I think, a not unfair summary of the cases, if it be added that no case was called to my attention, and I have found none, in which a decree was refused on the ground of the respondent's insanity. I do not pause to examine the cases in detail now because their effect is reproduced in Sir Charles Butt's charge to the jury in *Hanbury* v. *Hanbury* (1) to which I have already alluded.

Then, the argument continues, there is nothing in the

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(1) [1892] P. 222.

Matrimonial Causes Act, 1937, to alter the quality of cruelty, the only alteration in this regard being the nature of the available relief. Where the discretionary remedy by judicial separation would have been afforded, a decree of dissolution, subject to the discretionary bars, must now be granted. This is a formidable argument, and one which I confess I have found attractive, but I have come to the conclusion that I cannot accept it.

To begin with, to do so would be to introduce, or, if that be not the right word, to establish in this Court, a measure of legal responsibility not applied to any other Court. On the facts of this case the respondent would not be held answerable outside this Court either civilly or criminally for his assaults, and it is therefore a very strong step to say that, in this Court by those self-same acts, he has done something which is in this Court not only an offence, but may, and indeed must, since divorce is not a discretionary remedy, alter his civil status.

The argument with which I am dealing proceeds upon the footing that, short at any rate of insanity of such a degree as leaves no hope of recovery but necessitates permanent confinement, the Divorce Court has not taken a cognizance of the state of the respondent's mind. This doctrine has its most forcible expression in Lord Stowell's judgment in *Kirkman* v. *Kirkman* (1), where he says " The persons of both "parties, however, must be protected from violence. . . . . If "that safety is endangered by violent and disorderly affections "of the mind, it is the same in its effects as if it proceeded "from mere malignity alone ; it cannot be necessary that, "in order to obtain the protection of the Court, it should be "made to appear to proceed from malignity." That is, I think, the high water-mark of the argument, but neither in that case, nor in *Hanbury* v. *Hanbury* (2), nor in any of the other cases is the test of legal responsibility established in *M'Naghten's* case (3) applied to the respondent's state of mind.

Possibly the evidence in those cases would have been

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(1) (1807) 1 Hagg. Con. 409.

(2) [1892] P. 222.

(3) (1843) 10 Cl. & F. 200.

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differently marshalled if the test applied in *M'Naghten's* case (1) had been its focus; but, taking it as it is to be gathered from the reports, in no case am I satisfied that it was such as to establish that the respondent did not know the nature and quality of his or her acts. I do not, therefore, regard those cases as authority for the proposition that, in this Court there is no degree of insanity that will afford an answer. If it were so, why should Sir Charles Butt so carefully have guarded himself, as he did in *Hanbury* v. *Hanbury* (2), and how can one reconcile the judgment in *Hall* v. *Hall* (3) with such a view?

If, then, there be a degree of insanity which affords an answer to a matrimonial suit, how is it to be safely measured except by the test applied in all other courts? In *Yarrow* v. *Yarrow* (4) that test was in fact applied to the acts of the respondent, though it was doubted whether even that degree of insanity would afford an answer to a suit for divorce on the ground of adultery. No question of insanity in relation to adultery arises in this case and I express no opinion upon that matter.

There is one other, perhaps not very important, consideration which points in the same direction. I have after all to deal with the statute law as it stands to-day. Sect. 2 (*a*) of the Matrimonial Causes Act, 1937, on which this suit is based is in these terms: "A petition for divorce may be presented ". . . . on the ground that the respondent has since the "celebration of the marriage treated the petitioner with "cruelty." I emphasize the word *treated* because that seems to me to connote a conscious action, and appears to indicate an action of which the doer knows the nature and quality. The indication may not be strong, and is probably not strong enough to found upon it an exception to the general rule of law. But the reverse is the case; the presumption is against an exception and the indication points in the same direction.

I have said that my conclusion of fact is that the respondent did not know the nature and quality of the acts which he committed in the year 1927, and, if those acts stood alone the petitioner could not get relief, since in my judgment intention or malignity is an essential ingredient in cruelty. But, as I have indicated, there was a threat in March, 1931. On that occasion he came up to the house where his wife was living and shouted that, though they might think themselves safe, neither his wife nor her family would live much longer.

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(1) 10 Cl. & F. 200.

(2) [1892] P. 222.

(3) (1864) 3 Sw. & Tr. 347.

(4) [1892] P. 92.

What was the respondent's state of mind at that date? He had been at liberty since October, 1927; and remained at liberty until October, 1937, and, so far as I am aware, was sufficiently master of himself to commit no violence during that time. On the occasion in question there was no superior force to prevent him carrying out his threat; nothing in fact but his own self-restraint. Of course it does not follow that he knew he was uttering a threat, but it makes it probable that he did; the medical evidence, which I accept, is to the same effect, and I find that he knew he was uttering threats against his wife. Upon that view of the facts he was responsible in law for what he then did.

The next question is whether this act of cruelty, an isolated act so far as he was concerned, was such and of such gravity as to justify a decree in the petitioner's favour. If I were to regard it as a single isolated act from the petitioner's point of view, an act without any antecedent history, I should probably answer no. But to do so would be, I think, to take an artificial and technical point of view, and to lose sight of the realities of the case. With her past experience in mind, the threat had for the respondent a reality and force out of all proportion to that which it would have had if he had not already made attempts upon her life. It was little wonder that she sought police protection. I think I must take the earlier history into account, not as aggravating the quality of his single act of cruelty, but as aggravating its consequences. For those consequences he is, in my opinion, responsible, although I have acquitted him of the acts which gave them their gravity. I think it is like those cases, not unfamiliar in the Criminal Courts, where far graver

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consequences than one would anticipate have followed some comparatively slight assault, owing to some physical infirmity of the victim.

For these reasons I think the petitioner is entitled to the relief she claims.

The petitioner was granted a decree nisi of divorce.

Solicitors: *Haslewood, Hare & Co., for Lake, New & Ellis, Stockport: the Official Solicitor.*

W. L.

END OF VOL. AND OF PROBATE SERIES FOR 1939.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1939, will be as follows :—

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committed in the year 1927, and, if those acts stood alone the petitioner could not get relief, since in my judgment intention or malignity is an essential ingredient in cruelty. But, as I have indicated, there was a threat in March, 1931. On that occasion he came up to the house where his wife was living and shouted that, though they might think themselves safe, neither his wife nor her family would live much longer.

What was the respondent's state of mind at that date ? He had been at liberty since October, 1927 ; and remained at liberty until October, 1937, and, so far as I am aware, was sufficiently master of himself to commit no violence during that time. On the occasion in question there was no superior force to prevent him carrying out his threat ; nothing in fact but his own self-restraint. Of course it does not follow that he knew he was uttering a threat, but it makes it probable that he did ; the medical evidence, which I accept, is to the same effect, and I find that he knew he was uttering threats against his wife. Upon that view of the facts he was responsible in law for what he then did.

The next question is whether this act of cruelty, an isolated act so far as he was concerned, was such and of such gravity as to justify a decree in the petitioner's favour. If I were to regard it as a single isolated act from the petitioner's point of view, an act without any antecedent history, I should probably answer no. But to do so would be, I think, to take an artificial and technical point of view, and to lose sight of the realities of the case. With her past experience in mind, the threat had for the respondent a reality and force out of all proportion to that which it would have had if he had not already made attempts upon her life. It was little wonder that she sought police protection. I think I must take the earlier history into account, not as aggravating the quality of his single act of cruelty, but as aggravating its consequences. For those consequences he is, in my opinion, responsible, although I have acquitted him of the acts which gave them their gravity. I think it is like those cases, not unfamiliar in the Criminal Courts, where far graver consequences than one would anticipate have followed some comparatively slight assault, owing to some physical infirmity of the victim.

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For these reasons I think the petitioner is entitled to the relief she claims.

The petitioner was granted a decree nisi of divorce.

Solicitors: *Haslewood, Hare & Co., for Lake, New & Ellis, Stockport: the Official Solicitor.*

W. L.

END OF VOL. AND OF PROBATE SERIES FOR 1939.

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